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ABSTRACT

The legal aspects of many campus issues were the concerns of the conference "Higher Education: The Law and Institutional Response." The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decisionmaking. The issues of concern were questioned and examined not from a philosophical or sociological point of view but in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication. The topics of the speakers include: undergraduate education; student organizations and publications; impact of the Tinker decision; ramifications of lowering the majority age; academic freedom and due process; women's rights; and the Supreme Court's view of faculty employment rights. (Author/PG)

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Proceedings

HIGHER EDUCATION: THE LAW AND INSTITUTIONAL RESPONSE

Edited by

D. Parker Young

Sponsored by

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CONTENTS

Page

Introduction 1

An Updated Constitutional Crisis—The Undergraduate Education

Robert B. Yegge 3

Student Organizations and Publications: The Continuing Impact of the Tinker Decision and the First Amendment

Robert D. Bickel 10

Lowering the Age of Majority—Some Possible Ramifications

D. Parker Young 38

Academic Freedom and Due Process in the Classroom

M. M. Chambers 44

Women's Rights in Education

Jane M. Picker 52

Faculty Employment Rights—The Supreme Court Speaks

Thomas S. Biggs, Jr. 59

INTRODUCTION

The legalistic tenor of the times breeds confrontation. Those newly aware of their rights and those disenchanted with their lot confront institutions on all sides, demanding changes and challenging concepts and regulations heretofore unquestioned. And the vigor and sophistication of their demands make it imperative that college and university officials meet their challenge with equal thoroughness and intensity. That institutions must answer their constituents in a manner consistent both with their educational purpose and with the law is now clear; and it is to aid those who must respond for the institution that this conference was convened, trusting that preparedness will lead to constructive change.

The legal aspects of many campus issues were the concerns of the conference "Higher Education: The Law and Institutional Response." The conference was sponsored jointly by the Institute of Higher Education and the Center for Continuing Education and held at the University of Georgia Center for Continuing Education on June 25–26, 1973. The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decision making. The issues of concern were questioned and examined not from a philosophical or sociological point of view but in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication.

Due to the sudden illness of Dean Robert Yegge, Mr. Donald Teasley presented his paper entitled "An Updated Constitutional Crisis—The Undergraduate Education." His contention was that the emerging issue on the campuses of higher education is the quality of the education offered. He indicated that a student could now test the fairness of dismissal or discipline against a constitutional standard, and in the near future we may see him test the quality of his educational experience against a constitutional standard. Thus, the concerns of the campus will shift from the procedural to the substantive. It was suggested that the equal protection clause of the Constitution would be the means through which the constitutionality of this issue will be tested. The quality issue may be framed in such terms as to make it seem that we are questioning whether an undergraduate education is constitutional.

The legal ramifications of student organizations and publications served as the subject of the presentation by Dr. Robert D. Bickel. The topic was discussed from the standpoint of First Amendment rights, the application of due process in the recognition of student organizations, regulations concerning the time, place, and manner of publication, restraint on the basis of content, community and university standards of obscenity, the necessity of procedural safeguards, and the funding of university publications. Basic to much of his discourse was the **Tinker** case, which established that student expression must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" in order for restrictions to be imposed on the activity. It was pointed out that a college or university may engage in promulgating and enforcing regulations governing the time, place, and manner of publication and distribution of student publications and may restrain such publication and distribution upon a reasonable forecast of disruption or interference with college or university activities proximately resulting from the publication or distribution of the material in question. Prior restraint on the basis of content of student publications may be imposed only where the materials to be published and distributed are obscene, libelous, dangerously inflammatory, or contain otherwise illegal statements. In reference to the financial support of student publications, Dr. Bickel indicated that tax

supported colleges and universities were not obligated to create and financially support student publications; however, once the institution has undertaken to establish and support certain student publications, the courts have questioned the manipulation of support to enforce restraint upon the content of such publications.

In discussing the ramifications of the lowering of the age of majority, I tried to show the many changes, real and potential, which this action may effect in higher education. With the great majority of students now legally adults, the doctrine of in loco parentis is further weakened and the traditional system of student personnel administration placed in a new and somewhat tenuous position. To help interpret the new relationships that are evolving, I reviewed past litigation concerning residency and out-of-state tuition, dormitory residence requirements, student records, student financial support, and tort liability in an effort to facilitate recognition and acceptance of the new roles that are emerging. I stressed that the new awareness of adulthood on the part of students demands that institutions assume a responsible position that will make the coming change mean progress.

"Academic Freedom and Due Process in the Classroom" was discussed by Dr. M. M. Chambers. The topic was examined and related to both faculty members and college students. Several recent federal court decisions that upheld the instructor's academic freedom in regard to freedom of speech in the classroom were reviewed. One notable decision indicated that an instructor had "a constitutional right not to be dismissed solely because he had exercised his constitutional rights in a manner displeasing to certain of his superiors." Dr. Chambers proposed that faculty members of colleges and universities take steps to place more emphasis on safeguarding and encouraging the academic freedom of the student. Instructors should encourage open, candid, and fearless discussion of controversial questions. He suggested that simple and fair procedures should be established whereby students who feel aggrieved by the granting or withholding of marks or academic credits could readily obtain an unbiased review of those actions, similar to the processes now required in disciplinary cases.

Dr. Jane M. Picker addressed the issues involving "Women's Rights in Higher Education." After summarizing the legal foundations of women's rights related to employment, she reviewed litigation relevant to the areas of recruiting and advertising for employees, refusals to hire, testing, leave policies and fringe benefits programs, and termination and retirement. Her comprehensive presentation included a number of pending cases, attesting to the urgency of the issues related to women's rights. Dr. Picker concluded her presentation by comparing the legal fight for women's rights with earlier race discrimination litigation and by predicting that "the next few years will establish firmly the right of all persons to be free of invidious discrimination and base employment rights upon one's abilities rather than one's sex."

In his discussion of "Faculty Employment Rights--The Supreme Court Speaks," Dr. Thomas S. Biggs dealt primarily with recent decisions of the Supreme Court of the United States and their impact on faculty employment rights. It was emphasized by the **Roth** and **Sindermann** cases that non-tenured faculty must be given a hearing prior to their dismissal if a "property interest" exists. The United States Supreme Court is quoted as indicating that a "state-employed teacher who has a right to reemployment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract."

The law is ever evolving, and the pages presented here reflect this fact. There are few absolute answers in trying to find solutions to the many issues on campus. The conference presentations, as well as the question and answer discussion sessions, clearly showed that the rights and responsibilities of all on campus must be considered in any institutional response to the issues in order that the institution remain a free marketplace of ideas.

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AN UPDATED CONSTITUTIONAL CRISIS—THE UNDERGRADUATE EDUCATION

Robert B. Yegge*
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Before moving into my assigned topic for this session, I want to advise you of a recent affirmative action ruling. To eliminate any confusion, the following specific ratios must now be maintained in employment: ten Anglos (five men, five women); two Blacks (one man, one woman); one Chicano or Chicana; one American Indian, Asian, and Eskimo in rotation; fourteen heterosexuals, one homosexual; one Jew, ten Protestants, four Catholics; one Buddhist, Mormon, and Muslim in rotation; fifteen with sight, one blind; one handicapped; eight juvenile, four mature, two senile; two intelligent, ten mediocre, and four stupid.

The development of legal issues and rules of law follows a process which parallels the painting of a picture. The initial idea or situation emerges in the tentative lines of a sketch which is drawn and redrawn to provide the basis for the picture; then paint is applied, the form takes on substance and color, and the representation finally reaches a point where it becomes clear what the final painting will look like. At that point, even though there may be unfinished spots or a need for brush strokes to shade colors or clarify representations, we know what the essence of the work is and conceivably could complete the picture ourselves, because the ultimate result has become so well defined.

During the last several years, this conference has met to view the successive stages of the legal pictures being painted by the courts of our country in the area of the law and higher education. Beginning with sketches of four letter words and beards, vague outlines of a creature called due process and notions of something called student rights, the courts have drawn and this conference has annually viewed the creation of several legal doctrines as they took shape in relation to our particular interest—the campus and the law. Most of these issues have involved or brought in, as their development took shape, the Constitution of the United States of America.

I was asked today to update this relation of Constitution and campus, or, in terms of my analogy, to point out the brush strokes which have been added to the picture of campus and Constitution we have been viewing these last few years. But as I began preparing this material I became increasingly convinced that an update of previous issues is a subject which, if not uninteresting, is at least rather unproductive of discussion. The obvious metaphor to use at this point is that of "beating a dead horse," but that imagery does become somewhat unappealing, when you think about it. So I revert once again to my original comparison: the pictures of Constitution-campus relationships we have seen

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* Due to the illness of Dean Yegge, this paper was delivered at the conference by Mr. Donald Teasley, Assistant to the Dean, College of Law, University of Denver.

unfold have been so far completed that only finishing touches remain; the essence of the work has already been done. For most of the recent constitutional issues on campus we can discuss subtle refinements—not real substance.

In 1970, the title of this conference was "Higher Education: The Law and Student Protest." If that were the subject under consideration this year, what would be the extent of your interest? Moderate to non existent, I presume. As the conflicts over student protest reached the courts, the questions which previously brought us together began to fall into understandable, predictable, and less emotional categories. We learned that students take their constitutional rights with them to college. We began defining free speech in the context of a campus environment and found that, while the privilege of free speech, expression and assembly was very broad, it stopped or severely faltered at the points of disruption of university functions, denial of free access to buildings, or destruction of property. We are now distinguishing circumstances in these matters, not deciding basic issues. Similarly, we have found that search and seizure actions on a campus must, as in all other constitutionally protected areas, be "reasonable." The courts are continuing the process of defining a reasonable search in terms of the campus environment, but guidelines for many situations have already been set out for administrators to follow.

Students can have full due process of the law. Campus officials must now be concerned with whether they are arbitrary in their actions, but the courts have not taken from an institution the right to discipline or dismiss a student or curtail student activities demonstrably harmful to the interest of the institution.

When the institution's self image as surrogate parent began to give way, new relationships had to be established. A significant part of the search for these new associations took place in the courts, and the basis of these relationships has been defined.

We have also seen that the Constitution will be used as a standard on the private as well as the public campus. Here again, the issue is resolved; we can only look for refinements of the doctrine.

Not only is the law taking on defined characteristics, but also, even where issues have yet to be resolved, the concern over previously hot constitutional matters has become a somewhat benign interest, both in the courts and on the campus. On May 14, of this year the U. S. Supreme Court refused to grant certiorari on the constitutionality of grooming regulations in state institutions of higher education, even where a conflict of decisions existed among the circuits.[1] Could the Court be saying, "Who cares! We're not going to be bothered with matters of this nature."

The Court apparently feels it has more important issues to consider; and I believe there are more important questions surfacing on the campus to which this conference should turn its attention. With the possible exception of the area of collective bargaining, we seem to be moving into an era of relative peace and stability, if not apathy, where wars of Constitution and campus were being violently fought during tha last few years.

It is not the constitutional standards of previous years which need to be updated at this time; rather, it is the Constitution as an **idea** which needs to be updated. The paintings from the past few years are nearly complete, and we need to look for the sketches of the new doctrines which will emerge from the Constitution and be impressed on our campuses.

Because the Constitution is a set of laws, we become inclined to think of it as a super-statute to set standards and be interpreted as any other law. But the Constitution functions as more than law; it is also an idea, a principle which carries with it the history and the aspirations of the American people. Each generation will use its own values to give its own unique content to constitutional principles. The document has not become a capricious tool, because it is law; but it continues to adapt, because it is an idea.

The Supreme Court articulated this view when Mr. Justice Holmes stated: "The provisions of the Federal Constitution are not mathematical

formulas having their essence in form but they are organic, living institutions. Their significance is vital, not formal and is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.[2]

I want to offer some thought on where that line of growth is now being directed and the bases on which it will pursue its course. My contention is that the primary issue on the campuses of higher education is becoming and will become the quality of the education being offered. A student can now test the fairness of dismissal or discipline against a constitutional standard; in the near future we may see him test the quality of his educational experience against a constitutional standard. We have been caught up in setting procedural standards for the educational process, and the question of substance and quality has been dormant; it is now surfacing.

Two of the issues identified by the Carnegie Commission's report on "The Purposes and Performance of Higher Education in the United States: Approaching the year 2000" were these:

1. Should higher education be content to offer "equality of opportunity" with differentiated results or, should it be committed to "equality of results"?

2. Does the responsibility of colleges for educating students stop with their intellectual and occupational development? Or does it extend to other aspects of their personalities as well?

The concerns of the campus are shifting to the substantive from the procedural. In the Carnegie Commission report a concern is expressed about educational quality that sounds hauntingly like the equal educational opportunity dealt with in desegregation cases. Can we substitute "equal quality" for "equal opportunity" and then apply the same constitutional standard to create rights to quality that we have applied to established rights to opportunity.

Brown v. **Board of Education**, 247 U.S. 483 (1954), and the line of cases arising from it have been used exclusively as authority to apply the equal protection clause of the Fourteenth Amendment to situations involving segregation, but that case arose out of notions of the quality of education. The court said that, no matter how comparable in facilities and instruction the segregated schools could be made, the black children were still getting an inferior education (it was not of equal quality) and were being denied the equal protection of the laws.

There is some language in **Brown** v. **Board** which is particularly significant for purposes of these contentions about quality. Mr. Chief Justice Warren said: "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." But on the facts of the case he was considering the quality of education——not that it did not exist at all. He proceeded to say: "Such opportunity (substitute 'quality') where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The effect of **Brown** was in the area of segregation, but its genesis was in the realm of quality.

This concern for the quality of education is still with us, and as the procedural issues are disposed of the question of quality will be increasingly confronted. Already the quality question is being dealt with by the courts. The outlines of the picture are being placed on the legal canvas, and the issue over which they have been drawn is school finance. I want to trace briefly the results of this initial encounter of the Constitution and the idea of a quality education. Then I want to discuss the nature of the equal protection doctrine and project where it will take the notion of quality education in the next few years——and with what implications and results.

In 1971 the California Supreme Court ruled in **Serrano** v. **Priest**, 5 Cal. 3d 584, 487 P.2d 1241 (1971), that the disparity in funding among certain school districts, which resulted in

spending considerably more on educating a child in one district than in another, was a denial of equal protection of the laws. The quality of a child's education could not be a function of the wealth of his parents or neighbors.

Expectations were voiced that this suit would be as socially significant as **Brown** v. **Board.** Here the quality of a child's education was being directly addressed. Since **Serrano,** nearly forty similarly aimed suits have been filed in lower state and federal courts; but the immediate expectations of Serrano and its family of cases were recently dealt a severe setback.

The case of **San Antonio Independent School District** v. **Rodriguez** ____ U. S. _____ (1973), 337 F. Supp. 280 (1971), was brought in a federal district court in Texas. It challenged the constitutionality, under the equal protection clause of the Fourteenth Amendment, of the state's system of financing public education. The basis of the suit was educational quality. Rodriguez won in the district court, but on appeal to the U. S. Supreme Court the decision was reversed in a five-four decision, holding that the equal protection clause did not apply and that education was not a fundamental right protected by the Constitution. So quality as a constitutional right lost the first round but left some distinctive sketches for how this picture might eventually be completed. Even while reversing the original decision, Mr. Justice Powell left open the door leading to a quality education argument when he said that, even assuming there were a constitutionally protected quality of education, there was no showing that the system failed to provide it. This, of course, suggests that a stronger showing of need might bring the area within constitutional protection.

When the New Jersey Supreme Court considered the same financing issue, it also ruled that the equal protection clause did not apply, but then proceeded to strike down school district financing inequities on the basis of a state constitutional guarantee of a "thorough and efficient system of public schooling."[3] This decision does not help our constitutional argument, but it does reinforce the growing concern for educational quality.

Let me say at this point that I do not believe the argument for a constitutional standard for a quality of education loses force because of decisions holding counter to the principle. I am suggesting a growing trend in the law and our society that will eventually mold the law to its demands. Constitutional law is replete with once controlling doctrines which are now overturned in the wake of new evidence, new mores or new members of the Court.

To pursue the argument from here we need to examine more closely the meaning of "equal protection of the laws." The fundamental purpose of this section of the Fourteenth Amendment is to make certain that the states will apply the same laws equally to all persons in similar circumstances.[4] Prior to 1960, judicial intervention in the name of "equal protection" was virtually unknown outside racial discrimination cases. Under the Warren Court the doctrine was specifically expanded into other areas, such as criminal appeals,[5] voting rights,[6] and a few others areas; but the promise of the "new equal protection" seemed limitless. The possibilities seemed to reach to such matters as welfare benefits, zoning, municipal services, and school financing. The basis of the new equal protection was a notion called "fundamental rights," and where this open-ended concept was found, as in the right to vote or the right to a transcript in a criminal appeal, the new equal protection was soon to follow. This is the legacy we carry into our investigation of a potential right to a certain quality of education.

The Burger Court has tended to block the expansion of the new equal protection and has concurrently cut back on what seemed to be our fundamental rights. (It is curious how those fundamental rights seem to come and go.) At this point in time education has not been determined to be a "fundamental right" under the U. S. Constitution. However, Mr. Justice Marshall in his dissent in **Rodriguez** identifies education as a fundamental right, and his view is supported by much federal court language and shared by many state court decisions. Let me ask whether you believe this modern society will continue to allow the view that education is not a fundamental right

or believe that a right to education will become part of our constitutional idea. If the new equal protection is ever given a new breath of life, I contend that one of the first places it will settle is on the issue of the quality of education.

There is a second development in the doctrine of equal protection which is perhaps even more significant for this consideration. An analysis of equal protection can easily be translated into an argument for **minimum** protection. We have thought of equal protection as shielding one from discrimination, but there is another side to that coin, one which fulfills what has previously been a deprivation. If we see inequality as the inability to satisfy certain basic wants or needs felt by all alike, then the notion of equal protection begins to appear as minimum standards to be met rather than merely as consistent application of a particular law. Equal protection turns out to involve "providing for" in accordance with a minimum standard. Who can define the minimums? I do not know, but I do know that the need for exact definition has not previously deterred the Court where a significant legal principle was involved. It is still trying to define "due process" and is content to let that definition emerge out of the controversies.

Harvard Law Professor Frank Michelman points out that the argument for minimum protection as applied to specific needs and occasions depends on the proposition that justice requires more than a fair opportunity to meet certain needs--that it requires that they be met.[7] Minimum protection does not look to inequalities but for instances in which persons have important needs or interests which they are prevented from satisfying because of circumstances which are not a matter of free choice. Such notions of minimum protection are certainly becoming entrenched in our welfare system.

Let me ask you: in this society, does justice demand minimum educational assurances? If your reaction is "yes," then you are moving into the area of minimum protection.

Lawrence Hayworth succinctly sums up the concern: "one is poor not because he has no money, but because he lacks access to social instrumentalities that make socially significant action possible . . . in larger part it is not having the character or competence that establishes one's capability of taking up an opportunity that is formally open."[8]

The legal application of the minimum protection concept is at this point very limited, but tenacious where applied. In the criminal procedure cases beginning with **Griffin** v. **Illinois** and continuing in the numerous following decisions, the court is insisting that as a matter of constitutional right a state which subjects a man to criminal prosecution must make certain that he is not prevented by deprivation of means of defending himself with full effectiveness.[9]

The same principle is held where the right to vote is involved. "The right to vote is too fundamental to be burdened or conditioned by a payment requirement"--a poll tax.[10] Here the law was being equally applied--everyone had to pay a certain amount--but the court was saying that there was a minimum protection involved that was so fundamental we could not look to equal application of law to eliminating the deprivation of a fundamental right.

The essential suggestion I want to make today is that the issues in higher education are going to move to questions about its quality and qualities. I believe the outlines of this development have been sketched. When the content begins to be filled in, the tool will be the equal protection clause of the Constitution, and that clause will carry the idea given it by the society on which it operates. The approach may be through fundamental rights, minimum protection, or some other device; but the quality question in higher education is due for a confrontation, and the issue may well be framed in such terms as to make it seem that we are questioning whether an undergraduate education is constitutional.

The quality of education concept has some interesting implications. Collective bargaining makes the assumption that all persons in an equal position are of equal ability. If the educational quality principle takes hold, it is on a collision

course with the basic principle of collective bargaining, because the primary question becomes what one has to offer and not how he has been treated. Tenure comes under increasingly heavy attack when the quality of education becomes the dominant objective. In like order, "affirmative action" has a potential conflict with an overriding goal of the quality of an education. Curricula would be re-evaluated to determine if they are in fact meeting existing needs, both in terms of purely intellectual growth and capacity of the whole person to function adequately in this society.

I have made these contentions today not only to develop a legal theory about the relationship of our Constitution to the campus but also to express a growing personal conviction that, because of the procedural safeguards we are building into all phases of the process of higher education, we are tending to lose sight of the quality and content of the education. I believe we tend to drift toward the view that the process is the product. We seem to be falling victim to the view tacitly held by our court systems that if you are correctly processed through the system you have received justice. That mode of thinking is being radically challenged in the court systems today, and I am concerned that we do not slide into the same mode of thinking in our institutions of higher education.

In the introduction to his book **Future Shock**, Alvin Toffler quotes a Chinese proverb which says: "To prophesy is extremely difficult—especially with respect to the future." He goes on to say that "in dealing with the future it is more important to be imaginative and insightful than to be 100% right. Theories do not have to be right to be enormously useful." That, of course, is a principal assumption behind what I have said today. I offer a tentative sketch of the picture of Constitution and campus that will emerge from the courts in these next few years.

FOOTNOTES

1. **Tyler Jr. College** v. **Lansdale,** ____ U. S. _____ (1973).
2. **Gompers** v. **United States,** 233 U. S. 604 (1913).
3. **Robinson** v. **Cahill** 62 N.J. 473, 303 A.2d 273 (1973)
4. **Frost** v. **Corporation Commission,** 278 U. S. 515 (1928).
5. **Griffin** v. **Illinois,** 351 U. S. 12 (1956).
6. **Harper** v. **Virginia Board of Education,** 383 U. S. 663 (1966)
7. 83 **Harvard Law Review** 7.
8. Hayworth, "Deprivation and the City Good" in **Power, Poverty and Urban Policy.**
9. **Douglas** v. **Calif.,** 372 U. S. 353 (1963); **Anders** v. **Calif.,** 386 U. S. 738 (1967); **Draper** v. **Washington,** 372 U. S. 487 (1963).
10. **Harper** v. **Virginia State Board of Elections,** 383 U. S. 663 (1970).

STUDENT ORGANIZATIONS AND PUBLICATIONS: THE CONTINUING IMPACT OF THE TINKER DECISION AND THE FIRST AMENDMENT

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* * * Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the risk, [citation omitted] and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Justice Abe Fortas, **Tinker** v. **DesMoines School District**, 393 U. S. 503, 508 (1969)

* * * [I] do not believe any form of censorship--no matter how speedy or prolonged it may be--is permissible. * * * Any authority to obtain a temporary injunction gives the State 'the paralyzing power of a censor.' . . . The regime of Kingsley Books 'substitutes punishment by contempt for punishment by jury trial.' . . . I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.

Justice William O. Douglas, joined by Justice Hugo Black, concurring in **Freedman** v. **Maryland**, 380 U. S. 51, 61 (1965)

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court. * * * [T]he Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable.'

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, [citation omitted] the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech--'symbolic' or 'pure'--and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. * * * I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or

expression.' * * * The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. * * * It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. * * * Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. * * * I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Justice Hugo Black, dissenting in **Tinker** v. **DesMoines School District, supra,** at 515.

* * * The Court cautions that the 'disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.' Quite so. But a wooden insistence on equating, . . . the authority to criminally punish with its authority to exercise even a modicum of control over the University which it operates, serves neither the Constitution nor public education well. There is reason to think that the 'disenchantment' of which the Court speaks may, after this decision, become wide spread among tax payers and legislators. The system of tax supported public universities which has grown up in this country is one of its truly great accomplishments; if they are to continue to grow and thrive to serve an expanding population, they must have something more than the grudging support of tax payers and legislators. But one can scarcely blame the latter, if told by the Court that their only function is to supply tax money for the operation of the University, the 'disenchantment' may reach such a point that they doubt the game is worth the candle.

Justice Rehnquist, dissenting in **Papish** v. **Board of Curators of University of Missouri,** U. S., 93 S.Ct. 1197, 1202 (1973)

In no other single area of the law do the thoughts of the distinguished judicial personalities of this country differ more markedly than those emanating from the debates incident to the application of the first amendment to the United States Constitution to the individual and collective society, including the public educational community. It is beyond cavil that Justice Hugo Black represents perhaps the greatest defender of First Amendment freedoms ever to sit on the judicial bench. Yet, Justice Black dissented from the landmark opinion of the United States Supreme Court applying the constitutional guarantees of freedom of expression to the environment of the public school. Stating unequivocally five years prior to his dissent in **Tinker** v. **DesMoines School District**[1] his opposition to all forms of censorship of expression as applied generally to the individual member of a free society, Justice Black nevertheless characterized the holding in **Tinker** as an inappropriate extension of First Amendment liberties to an environment in which, in his opinion, the restriction of free expression, including symbolic expression, was a legitimate exercise of the power of the state.

It has been some time, I believe, since serious thought has been given to the total opinion of the United States Supreme Court in **Tinker.** Many lower federal courts, and some state courts, have chosen rather to extract only its now famous basic holding, that symbolic expression cannot be

prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," and to apply this "test" to protect all forms of expression in public schools, including public colleges and universities, absent proof of facts to support a finding of the probability of actual disruption of school activities proximately resulting from the form of expression in question.

The oft-quoted language from **Tinker** emanated from the Fifth Circuit Court of Appeals' earlier decision in **Burnside** v **Byars.**[2] The **Burnside** case involved the wearing of "freedom buttons" by plaintiffs, students at Booker T. Washington High School in Philadelphia, Mississippi. The principal of the school prohibited the wearing of the buttons on the ground that they were not related to the students' education and would create a disturbance. The plaintiffs defied the order of the principal, were suspended, and brought suit in federal court alleging violations of First and Fourteenth Amendment protections. The school defended the suit on the ground that the regulation imposed was reasonable in maintaining proper discipline.[3] The court of appeals reaffirmed that the establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning and that in the promulgation of such regulations school officials have a wide latitude of discretion.[4] However, the court held that the school is always bound by the requirement that the rules and regulations promulgated by it be reasonable, defining reasonable regulations as those "which are essential in maintaining order and discipline on school property . . ."[5] In discussing the facts of the case, the court held that the prohibition on the wearing of "freedom buttons" was not supported by evidence that the buttons caused any disturbance or even that they tended to distract the minds of the students away from their teachers, noting specifically that the principal, himself, testified that the children were not expelled for causing a disturbance of classes but for violation of the regulation **per se.** On these facts, the court held the regulation to be arbitrary and unreasonable, concluding its opinion with its now famous statement adopted by the U. S. Supreme Court in **Tinker:**

> [W] ith all this in mind, we must also emphasize that school officials cannot ignore expressions of feeling with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment of the Constitution, where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.[6]

On the same day, the same panel of judges decided **Blackwell** v. **Issaquena County Board of Education,**[7] involving the wearing of similar "freedom buttons" at Henry Weathers' High School. In a factual situation distinguished from that in **Burnside,** the court upheld the action of school officials in banning the wearing of such buttons and requiring certain students wearing the buttons to leave school, where the record demonstrated evidence of a general disturbance of classes and interference with the discipline of the school by students wearing buttons. Specifically, the record in **Blackwell** demonstrated that students wearing buttons interfered with certain classes and accosted various students in the hall, attempting to force them to wear buttons. Noting again the rules laid down in **Whitney** v. **People of the State of California**[8] and **Dennis** v. **United States,**[9] the court stated that the test in **Dennis** which should be looked to is whether the gravity of the "evil," discounted by its improbability, justifies such an invasion of speech as is necessary to avoid the danger.[10]

In **Tinker,**[11] the language of the Fifth Circuit was presented to the United States Supreme Court on appeal from the Eighth Circuit Court of Appeals, affirming by an equally divided court the suspension of Iowa public school students for wearing black armbands to school in protest of the government's policy in South Vietnam. The evidential basis for the Supreme Court's reversal of the court of appeals was the finding that in wearing the armbands the plaintiffs did not disrupt the orderly activities of their high school or impinge upon the rights of other students. Under these circumstances, the court held their conduct within the protection of the free speech clause of

the First Amendment and the due process clause of the Fourteenth Amendment.[12]

The court held that where the wearing of the armbands constituted a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the plaintiffs--i.e., where the record showed no evidence whatever of plaintiffs' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone--school officials could not ban such expression. The court found that, in **Tinker**, unlike in **Blackwell**, the case did not concern speech or action that intruded upon the work of the school or the rights of other students.[13] In responding to school officials' assertion that their action was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands, the majority of the court expressed its opinion in the famous language appearing in the very beginning of this article.[14]

The court held that:

> In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[15]

The primary impact of **Tinker** is not merely its application of basic First Amendment law to the school setting; it is also the reawakening, in **Tinker**, of the "reasonableness" test of the judgment of persons engaging as representatives of the state and in the interest of the state in the restraint of certain first amendment activities. As Justice Black eloquently demonstrated in his dissent from the decision of the majority in **Tinker**, this test places school officials in the doubly precarious position of having to exercise judgment in forecasting the possibility of disruption or interference with the activities of their schools and perhaps finding their action not to the liking of the federal courts, the latter having the benefit of hindsight to aid in their analysis of the constitutional validity of the restraint placed upon the expression in question.[16] It is this test, now one perhaps all too familiar to most school administrators, that has been extended by the federal courts to virtually all forms of expression within the school setting, including most recently expression in the form of student organizations and student publications.

First Amendment Constitutional Law as Applied to the Recognition of Student Organizations

It appears to be established that, whether or not one agrees with the holding of the majority of the Supreme Court in **Tinker**, the thrust of the majority opinion (the "Tinker Test" of "Material and substantial disruption or interference with the rights of others") has become the basic test applied by courts in adjudicating the rights of public and in some instances private colleges or universities[17] to deny recognition to applicant student organizations. The federal decisions are in league in the few major student organization cases, as they are in dozens of cases involving other forms of expression on the campuses of public high schools and colleges, that, as held by the majority in **Tinker**, students at a university do not shed their constitutional rights--especially those related to basic freedoms, like freedom of speech--upon matriculation.[18] Moreover, it is clear from the analogy of the "speaker ban" cases that once a university makes certain organizational activities available to its students, it must operate these activities in accordance with First and Fourteenth Amendment principles.[19]

However, it is also clear from **Tinker** that freedom of speech is not an absolute right and that student organizations do not enjoy an unqualified entitlement to recognition by a university administration.[20] In accord with this proposition, the decisions of federal courts that a university has the inherent power to expect its students to adhere to generally accepted standards of conduct and, in this regard, has wide discretion in

responding to threats of disruption or situations involving a reasonable forecast of disruption are applicable to associational activities in the form of student organizations.[21]

It is, therefore, in my opinion, within the power of college officials to deny recognition to an organization whose purposes and goals are inimical to the educational goals and objectives of the university. However, the collision of the purposes and goals of any applicant organization with the educational goals and objectives of the university must be demonstrated by the actions and not merely the philosophy of the organization.

In **Healy** v. **James,**[22] the United States Supreme Court, relying in great measure upon its past opinion in **Tinker,** established that a denial of recognition to an applicant student organization applying for official recognition on a public college or university campus must be predicated upon some reasonable forecast of disruption which might occur should recognition be granted, rather than upon the mere countenancing by the organization of disruption as a philosophy.[23]

The **Healy** case involved an application by the Students for a Democratic Society for recognition on the campus of Connecticut Central State College. Recognition was denied, and suit was instituted in the United States District Court for the District of Connecticut.[24] After a remand by the district court to the university to provide for a hearing on the question of recognition, a subject to be discussed, **infra.**, the district court upheld the denial of recognition on the ground that the organization had failed to meet its burden of showing that it could function free from the national organization, Students for a Democratic Society, and that the organization's conduct was "likely to cause violent acts of disruption."[25] The decision of the district court was affirmed on appeal to the second circuit, Judge Smith dissenting, the majority opinion based primarily upon the holding that the organization had failed to meet its burden of complying with the prevailing standards for recognition and noting that the disruptive influence of the organization was demonstrated in part by its conduct at the hearing for recognition.[26]

In reversing, the Supreme Court established the test noted hereinabove, **i.e.**, that if the rejection of recognition is based upon a reasonable forecast, with some demonstrable factual support in the record, that the organization would prove to be a disruptive influence at the university, there is provided a basis for the propriety of non-recognition and the affirmance of the decision of a college or university to deny recognition.

This rule has been placed in specific perspective by Judge Goldberg of the Fifth Circuit Court of Appeals, writing in **Shanley, supra,** at 970–71:

> The 'reasonable forecast' of disruption that might result from the exercise of expression is a more difficult standard to apply. It is not necessary that the school administration stay a reasonable exercise of restraint 'until disruption occur[s]" [citations omitted]. Nor does the Constitution require a specific rule regarding every permutation of student conduct before a school administration may act reasonably to prevent disruption [citations omitted] * * *[27]

As Judge Goldberg held in **Shanley,** the test of reasonableness, to which the reviewing court should defer, basically requires the administration to provide some basis in fact for forecasting material or substantial disruption rather than an undifferentiated fear or apprehension of such disruption.

Discussing the test within the facts occurring in **Healy,** the Supreme Court stated that:

> As the litigation progressed in the district court, a third rationale for President James' decision––beyond the consideration of affiliation and philosophy––began to emerge. His second statement, issued after the court ordered hearing, indicates that he based rejection upon a conclusion that the particular group would be a 'disruptive influence at CCSC.' * * * **If this reason, directed at the organization's activities rather than its philosophy were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of non-recognition.** [emphasis added][28]

In sum, **Healy** establishes that if there is an evidential basis to support the conclusion that the organization applying for recognition poses a substantial threat of material disruption, the decision to deny recognition should be affirmed by a federal court.[29]

Although quite interestingly not contained within the text of its opinion, the Supreme Court includes within the test outlined above the contention that denial of recognition may also be predicated upon a showing of likelihood of unwillingness on the part of the organization to recognize reasonable rules governing campus conduct.[30]

In deciding **Healy**, the Supreme Court was again following the lead of the United States Court of Appeals for the Fifth Circuit, which had in 1971 extended the **Tinker** test to situations involving the recognition of student organizations in **University of Southern Mississippi MCLU** v. **University of Southern Mississippi.**[31] In deciding the **University of Southern Mississippi** case, Judge Wisdom, writing for the court, noted that:

> Twice this court has been a harbinger of major expansions in the first amendment rights of students. In **Dixon** v. **Alabama State Board of Education,** 5 Cir. 1961, 294 F.2d 150, we turned our backs on the old saw that attendance at a university was a privilege granted by the state and was, therefore, subject to whatever conditions the state sought to impose. Five years later, we said that students' rights to free expression cannot be curtailed unless that expression 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.' **Burnside** v. **Byars,** 5 Cir. 1966, 363 F.2d 744, 749. * * *[32]

The Fifth Circuit characterized the issue in the **University of Southern Mississippi** case as one involving freedom of expression substantially similar to that involved in **Tinker** and directly analogized the issue to that presented in the speaker ban cases which tested university regulations governing speech on school premises. Noting that "speaker bans" have been uniformly struck down,[33] the court stated that to sustain such censorial practices, a university would at the very least have to demonstrate a strong probability of the kind of material disruption spoken of in the **Tinker** case.[34]

The only demonstrable evidence of probable material disruption presented by the University of Southern Mississippi and accepted by the district court was the litigiousness of the national and state civil liberties unions. In examining the litigious character of the organization, the court of appeals held that only litigation conducted in bad faith might be considered disruptive under the **Tinker** test. The court then held that there was no evidence in the record to support the assertion that the chapter's litigation would be vexatious and frivilous and that a mere possibility of such, unsupported by evidence in the record, would not justify such a drastic curtailment of constitutionally favored expression as denial of recognition.[35]

The court distinguished **Healy** at the Second Circuit level on its facts, noting that there was disruption in **Healy** during the proceedings for recognition and also that certain members of the Students for a Democratic Society had advocated disruption as a means of achieving the goals of the organization.

The showing of a likelihood of disruption or unwillingness on the part of the applicant organization to recognize reasonable rules governing campus conduct can, in my opinion, be demonstrated by the present or past activities of the individual members of the organization seeking recognition. Where members of the applicant organization have demonstrated their advocacy of or a participation in disruptive activities, a denial of recognition should be upheld by the federal court against a constitutional challenge.[36]

There is no doubt, in my opinion, that should the members of a student organization participate in materially disruptive activities after recognition of the organization, the recognition granted may be withdrawn after a hearing on the basis of demonstrated evidence of disruptive activities. In

the **University of Southern Mississippi** case, the Fifth Circuit recognized the right in holding that it is:

> * * * far more compatible with free expression to relegate the university to its rights if the litigative activities of the chapter should turn out to be carried on with disruptive intentions and do result in substantial disruption to the life of the university. In that event, the recognition granted the chapter could be challenged and withdrawn in a fair proceeding based upon evidence of actual, and not vaguely predictive, misconduct.[37]

The prior disruptive activities of members of an organization applying for recognition was raised by the university in support of its denial of recognition to the organization in **Merkey, et al. v. Board of Regents of the State of Florida, et al.**[38] In the **Merkey** case, the university argued and the district court reached the conclusion that the organizational principles adopted by the Young Socialist Alliance, locally and nationally, included the belief that force is an acceptable means of bringing about change and that the organization was predisposed to initiate disruptive activities on the campus in an effort to accomplish its goals. Such conclusions were predicated upon examination of the organization's constitution, literature, and statements of its members, including the National Executive Committee, advocating disruption of the functioning of universities by the organization.[39] It was argued, however, that the most conclusive aspect of the case was the conduct of the plaintiff, Merkey, and other members of the applicant organization prior to and during the period of application for recognition on campus of the university. The disruptive activities of the members of the plaintiff organization, advanced by the university in support of its denial of recognition, included Merkey's arrest in connection with demonstrations on and off the campus during his period of membership in SDS and later YSA--including on-campus demonstrations involving sit-ins in campus buildings--and the arrest of one other officer of YSA in connection with disruptive activities on the campus, eventually leading to the expulsion of this second student after full hearings by the university.[40] The district court summarized this testimony in holding that:

> Without recanting all pertinent facts, the court recalls that defendants not only took great measures to satisfy themselves that plaintiff organization advocated the overthrow of the government and established institutions by the use of force and violent means but also determined that the Young Socialist Alliance was steeled for such immediate action on the campus so as to create reasonable apprehension of imminent danger to the university. Particularly was this true in this case where it was shown that the two primary applicants, Merkey and Lieberman, had by their past and present conduct been involved in disruptive activities both on and off the university campus.[41]

In the appeal of this case by the plaintiffs to the Court of Appeals for the Fifth Circuit, at oral argument, the court of appeals indicated that the decision of the court below may be affirmed only where the court's review of the record below indeed indicates proof by the university of disruptive activities carried on by members of the applicant organization or where there is other proof of the unwillingness of the organization to abide by reasonable university regulations governing campus conduct.

It is important to point out in conclusion that the posture of cases involving denials by colleges and universities of recognition to organizations applying for campus recognition, should, as in other cases, be reviewed, and the court's finding limited to ascertaining whether there is evidence in the record factually supporting the university's forecasting of disruption or an unwillingness on the part of the organization to abide by reasonable campus rules and regulations governing student conduct. Even more importantly, where the district court conducts an independent hearing on the facts, on the subject of the entitlement of the organization to recognition, the appellate court's review and finding should be limited to an examination of whether the district court's conclusions find support in the record or whether those conclusions are clearly erroneous.[42]

There are other regulatory powers residing in the university which provide a basis, apart from considerations of the probabilities of campus disruption, upon which to deny an organization official university recognition. The university may seek to deny recognition to an organization whose membership includes non-students where university organizations are traditionally those comprised only of students at the university. However, such a basis for the denial of recognition must be advanced initially in response to the application of the organization and, further, will be successful only so long as the university demonstrates equal treatment of all organizations of similar character.[43] Moreover, any regulations attempting to classify organizations must be drafted with reasonable definition and should be somewhat cautious against using language such as "organizations whose purpose is within the scope of the university" or "compatible with the aims of the college."[44]

The Application of Procedural Due Process in the Recognition of Student Organizations

Since **Healy**, there is no question that in student organization recognition cases a university administration carries the burden of eliciting facts which support a forecast of disruption. The burden must not be placed upon the organization applying for recognition to prove entitlement to recognition, i.e., that it would not, if recognized, be a disruptive force on the campus. This was, in fact, in **Healy**, the primary factor in the remand of the case.[45]

It is recommended that procedures governing the receipt and review of applications for recognition of student organizations, provide for the review of basic organizational documents, e.g., constitution and bylaws, and other documents establishing a description of the organization, and for a hearing, which may be relatively informal but which should allow the organization the opportunity to present relevant facts in support of its application for recognition, the opportunity for the university to present documentary and testimonial evidence in support of denial of recognition--which evidence must, under present case law, point to disruptive activities on the part of the organization or its members, or other proof of unwillingness to abide by reasonable rules governing campus conduct--and the opportunity for the organization to question and rebut the university's evidence. Further, the university should preserve in some manner the context of the proceedings in order to obviate the necessity of a **de novo** hearing in federal district court should denial of recognition ensue and should the organization file suit.

It should be pointed out that, even assuming that the review afforded applications by the university were to be deemed insufficient, any **de novo** hearing in federal court accomplished by reason of the filing of suit by the applicant organization and including a hearing of the substantive issues regarding the entitlement of the organization to recognition cures and renders moot any defects at the university level.

On appeal in **Fluker v. Alabama State Board of Education**, Judge Thornberry wrote:

> * * * [W]e have carefully reviewed the district judge's handling of this case and concluded that his was an extensive and independent review of the evidence, which afforded appellants their full procedural rights [citation omitted].[46]

Student Publications and the Constitution

An analysis of the application of First Amendment constitutional law to student publications assumes two directions. Many cases have concerned the time, place, and manner incidental to the expression, i.e., the method of procuring distribution and student interest in the publication. These cases have been placed by the courts primarily within the context of the test in **Tinker**, and the facts in such cases have involved alleged disruption effected by the distribution of the publication. The second line of cases, including most importantly **Joyner v. Whiting**[47] and **Papish v. Board of Curators of University of Missouri**,[48] are concerned with the content of publications and restraint upon publication or distribution predicated upon alleged obscenity,

libelous utterances, or other content which school officials believe necessitates partial or total restraint upon publication or distribution.

The Time, Place, and Manner Test

It is generally known that the law of student publications as defined by the federal courts had its real inception in the opinion of Chief Judge Johnson in **Dickey** v. **Alabama State Board of Education.**[49] This famous decision enjoined the suspension of Gary Clinton Dickey for publishing an issue of the **Tropolitan**, the school newspaper, containing the word "censored" diagonally across a blank space in place of an editorial which Dickey had been ordered not to publish. The proposed editorial was supportive of the position of Dr. Frank Rose, President of the University of Alabama, and regarded a program for a series of guest speakers and panel discussions at the University of Alabama entitled "Emphasis '67, A World in Revolution." Dickey was ordered not to publish the editorial under a college rule which disallowed campus editorials critical of the governor or the Alabama legislature. Dickey's conduct was termed willful and deliberate insubordination,[50] and such insubordination provided the basis for his suspension.

Judge Johnson held that rules which are necessary in maintaining order and discipline in the operation of an educational institution are legitimate.[51] However, the judge found that the maintenance of order and discipline had nothing to do with the rule invoked against Dickey--rather, that the reason for the rule was to preclude the student newspaper from criticizing the institutions which provided its support. Judge Johnson held that such a rule is unreasonable and that a state cannot force a college student to forfeit his constitutionally protected right of free expression except where the exercise of such right materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.[52]

Obviously, the action on the part of Troy State College taken against Dickey went to the content of Dickey's editorial; indeed, the facts of the case did not disclose any serious concern of college officials for disruptive activities on the campus as a consequence of the publication of the editorial. However, the **Dickey** case stands as the earliest major federal decision applying the **Tinker** test to extend the protections of free speech on college campuses to student publications and to express the "material and substantial disruption" test within the context of student publications.

Several decisions followed the Dickey decision with substantial federal litigation of interest occurring in 1970 at the district court level. In **Channing Club** v. **Board of Regents of Texas Tech University,**[53] Texas Tech precluded the dissemination of a campus newspaper partly because of allegedly obscene content or expression in violation of university rules and partly because of its solicitation and sale on the campus absent official authorization.[54]

In what might technically be deemed **dictum**, the court held that the standard devised for direct regulation of expression by a university under **Tinker** and **Burnside** v. **Byars** provides that the exercise of the expression sought to be limited must interfere to a substantial and material degree with the requirements of the appropriate discipline in the operation of the school.[55] No factually supported disruption or anticipation of disruption was found. On these facts, the court held against any regulation of expression, also striking down the university's alternative allegation of alleged obscenity in the content of the publication. The application of the **Tinker** test was continued in **Antonelli** v. **Hammond.**[56] In relating the content test to the **Tinker** test, the district court in **Antonelli** held that, in implying that college and university authority to exercise prior censorship over publications is limited under **Tinker, Burnside** v. **Byars,** and **Brooks** v. **Auburn University** to those situations where the exercise of such rights are incompatible with the school's obligation to maintain order and discipline necessary for the success of the educational process, obscenity in a campus newspaper is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined education process.[57] **Querterman** v. **Byrd**[58] extended this

principle to the circuit court level. In **Quarterman**, the fourth circuit considered, in the high school setting, the application of the **Tinker** test to the publication and distribution of an "underground newspaper" in violation of a school regulation prohibiting pupils from distributing, while under school jurisdiction, any advertisements, pamphlets, or other printed material without the express permission of the principal of the school.[59] Quarterman distributed the newspaper without prior permission and was suspended for ten days and placed on probation. Two months later he again distributed an "underground newspaper" in which a statement he printed concluded, "We have to be prepared to fight in the halls and in the classrooms, out in the streets because the schools belong to the people. If we have to--we will burn the buildings of our schools down to show these pigs that we want an education that won't brainwash us into being racist."[60] He was again suspended and sought declaratory and temporary and permanent injunctive relief against the enforcement of his suspension and any other punishment for his violation of this rule, as well as damages. On appeal from an initial stay of the action by the district court, the appellate court held that school authorities may by appropriate regulation exercise prior restraint upon publications distributed on school premises during school hours in those special cases where they can reasonably forecast substantial disruption of or material interference with school activities on account of the distribution of such printed material, noting that a similar rule prevails where the printed material is obscene under case law.[61] In justifying prior restraint where such a forecast of potential disruption exists, the court noted the proposition cited with approval by the Supreme Court in **Healy** v. **James, supra,** that it is not necessary that the school stay its hand in exercising the power of restraint until disruption actually occurs.[62] The court did indicate that a regulation guaranteeing procedural safeguards would be approved and further noted that judicial review of the decisions of school administrators where these safeguards are followed should be limited to a determination whether on the basis of the record as a whole there is substantial evidence to support the school's finding of reasonable likelihood of harm, the principle cited with approval in **Tinker** and **Healy**.[63]

The right of a college or university to restrict or prevent the publication and distribution of student publications on the basis of a reasonable forecast of probable disruption proximately resulting from such publication or distribution clearly was affirmed by the U.S. Supreme Court in **Papish** v. **Board of Curators of University of Missouri,**[64] although the court reversed the suspension of Ms. Papish on the ground that the facts set forth in the opinions below demonstrated that petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution.

In sum, under the **Tinker** test, a college or university may engage in promulgating and enforcing regulations governing the time, place, and manner of publication and distribution of student publications and may restrain such publication and distribution upon a reasonable forecast of disruption or interference with college or university activities proximately resulting from the publication or distribution of the material in question.[65]

Restraint on the Basis of Content

Many cases have been decided involving high schools', colleges', and universities' restraint of publication and distribution of student publications based upon the content of those publications. Generally, the court imposed standard allows prior restraint only where the materials to be published and distributed are obscene, libelous, or contain elements of the "fighting words" discussed in **Chaplinsky** v. **New Hampshire.**[66]

Many of the cases discussed hereinabove involved the application of proposed restraints upon publication predicated upon the content of the publication, as well as the conduct incidental to the expression. For example, in **Channing Club** v. **Board of Regents of Texas Tech University, supra,** the court restrained the university from enforcing its rule against "lewd, indecent or obscene conduct or expression on university-owned or controlled property," and "selling and soliciting [publications] on the campus without official authorization,"[67] on the

express ground that the enforcement of the regulation against the publication sought to be distributed resulted in a denial of equal protection and an implied finding of no proof of obscenity. The court noted that plaintiff's publication--sought to be restrained--was exhibited with other magazines and written materials allowed to be sold or distributed on the campus in the same location as plaintiff's publication and which contained the same or similar language which the university found objectionable in plaintiff's publication.[68]

It clearly appears to be accepted law that use of "four letter words" in student publications, especially at the college or university level, does not characterize the publication as obscene; rather, the test of obscenity is the community standard generally applied by the courts, except for latitudes permitted by some courts where materials are distributed to persons of high school age or younger. In this latter regard, the court in **Quarterman** v. **Byrd, supra,** noted that freedom of expression is not absolute and that the extent of the application of freedom of expression may properly take into consideration the age or maturity of those to whom it is addressed, the court noting particularly that publications may be protected when directed to adults but not when made to minors.[69]

As stated above, other restraints upon publication might be predicated upon the ground that statements contained in the publication sought to be distributed on a campus contained libelous, dangerously inflammatory, or otherwise illegal statements.

In **Korn** v. **Elkins,**[70] the University of Maryland refused to allow the editorial board of the university student feature magazine to permit the publication of an issue of the magazine with a cover picture of a burning American flag. The action of the university was taken pursuant to a Maryland statute prohibiting the public casting of contempt, by word or act, upon the Flag of the United States or the State of Maryland, including a copy, picture, or representation of the flag. The university's action was motivated by the refusal of the university's contract printer to print the issue for fear that printing it would subject the printer to criminal prosecution. The university proceeded to procure another printer; however, shortly thereafter the Attorney General of Maryland advised the university that the printing of the burning flag on the cover would constitute a violation of the state statute subjecting those persons responsible to the prescribed criminal penalties. On the basis of this opinion, the university advised the second printer that it could not authorize the printing of the cover. In discussing in great detail the Supreme Court's opinion in **Street** v. **New York,**[71] the court held that clearly the form of expression contemplated in the publication was protected under **Street** and that the Maryland statute could not constitutionally be applied to curtail that freedom of expression contemplated by the publication of the cover. The court noted that while a student may not enjoy the same privilege of non-malicious misreporting afforded to critics of public figures under **New York Times Company** v. **Sullivan**[72] there must be a showing that suppression of the contents of the publication is necessary to preserve order or discipline.[73] Concurring in part and dissenting in part, Judge Northrop stated that he would uphold the majority only because of an inconsistent application of the statute to restrain publication of the cover only and not the contents, some of which the first printer's attorney had also found to be possibly violative of the flag desecration statute. Judge Northrop then pointed out in dissenting that several decisions, including some referred to by the majority,[74] did subject persons to criminal prosecution for certain exhibitions of the American flag. He noted also in **Street** that at least four justices were of the opinion that the uniform flag desecration statute was facially constitutional. Judge Northrop concluded that the university should not be submitted to the risk of criminal prosecution when challenged by students to allow the publication of materials which may well lead to that prosecution. Judge Northrop's dissenting opinion, in my view, better commented upon the critical issues of the case and the dilemma faced by the university. After noting the university's and the printer's fear of possible criminal prosecution as the result of the publication of the cover, the majority in **Korn** seemed to divert its attention from the possible

illegality of the publication and transfer its thoughts to the application of the **Tinker** test, concluding that the university could not restrain the publication of the cover unless such publication would lead to disruption of the activities of the university. This reasoning does not recognize valid reasons other than those regarding possible disruption or interference with school activities, which, in my opinion, are a valid basis for the restraint of such publications, including possible expression violative of state law. It should be recognized that the Maryland statute interpreted by the attorney general in the **Korn** case might well have been subjected to successful constitutional attack. However, it was correct and necessary that the university not intentionally violate the attorney general's opinion nor subject itself or its printer to criminal prosecution. The court should have based its decision squarely upon its holding that the intervention of the federal court was justified in the absence of any state interpretation or construction of the Maryland flag desecration statute and that the statute could not be constitutionally applied without violating basic First Amendment freedoms. Such a holding frees the university from the possibility of application of the flag desecration statute against it or its printer without necessitating any decision regarding the probability or lack thereof of disruption on the campus as a result of the publication of the student magazine, which determination was not, in my mind, material to the court's decision.

The law regarding the application of any dual standard of content restrictions upon student publications on the college or university campus, at least as concerns obscenity, and by implication as concerns other content grounds, was squarely settled by the Supreme Court in **Papish** v. **Board of Curators of University of Missouri.**[75] In reversing disciplinary action against Barbara Susan Papish––predicated upon her publishing on the cover of the student newspaper an editorial cartoon depicting policemen raping the Statue of Liberty and the inclusion within the publication of an article entitled "Mother F....r Acquitted"––the majority of the court, in a succinct opinion, relied on its recent decision in **Healy** v. **James, supra,**[76] and held that the publication was not obscene by the standards of past cases decided by the court and therefore could not be restrained by university officials. The court reversed the finding of the Eighth Circuit Court of Appeals[77] that on the university campus freedom of expression can properly be subordinated to other interests such as, for example, "conventions of decency" in the use and display of language and pictures.[78] The Supreme Court directly overruled this language holding that:

> [H]ealy makes it clear that the mere dissemination of ideas––no matter how offensive to good taste––on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other recent precedents of this court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.[79]

The court noted and detailed in footnote 6[80] of its opinion that there was language in the opinion below suggesting that the university's action could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to time, place, and manner of expression. Particularly the district court emphasized that the newspaper was distributed near the university's Memorial Tower, supporting the conclusion by the district court that petitioner was engaged in "pandering." Noting its repeated approval of such regulatory authority, the Supreme Court nevertheless held that the facts set forth in the opinions in both the district and the appellate courts demonstrated clearly that the petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place, and manner of its distribution.

In its conclusion, the majority opinion held that the First Amendment to the United States Constitution leaves no room for the operation of a dual standard in the academic community with respect to the content of speech and that the university's action could not be justified as a non-discriminatory application of reasonable rules governing conduct.[81]

An important consideration in applying the aforementioned cases involving attempted restraint upon the publication and dissemination of various student publications on the basis of their content and/or the time, place, and manner of their distribution is the consideration whether other standards established for the operation of such publications may be established by colleges and universities. The most important right in this regard is that of the college or university to secure high quality journalistic standards and to enforce such standards.[82] The federal courts appear to support the proposition that the college or university may establish a campus newspaper or other student publications in the interest of providing students with the opportunity to develop writing and journalistic skills, such purposes being reasonably related to the educational process. Moreover, pursuant to such purposes, the courts have held it proper to restrict publication to articles written by students.[83]

However, assuming **arguendo** the validity of this proposition, college and university administrators should consider the caution of the majority in **Korn** v. **Elkins,** noting that because of the potentially great social value of a free student voice, it would be inconsistent with the basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the administration deems appropriate. In the words of the court, the power to prescribe classroom curricula in universities may not be transferred to ideas not designed to be a part of the curriculum.

Whether the prescribing of such journalistic standards will be upheld in cases where the college or university maintains no academic program in journalism is not settled. Such is the position of the university in **Schiff,** et al. v. **Williams,**[84] a case involving the firing of the student editor and associate editors of the student newspaper at Florida Atlantic University. It is the position of the university in **Schiff** that the dismissal of the plaintiffs from their editorial positions was necessary and proper in the exercise of defendant's duty to secure high journalistic standards for the newspaper and that the maintenance of such standards is an educational responsibility of the defendant. Specifically, defendant alleges that plaintiffs were discharged on account of their demonstrated incompetency, inability to perform their jobs, and infidelity to their responsibilities as editors of the college newspaper.[85]

The Community and Case Law Standards of Obscenity, "Fighting Words" and Other Illegal Statements

As is indicated hereinabove, the Supreme Court clearly abolished in **Papish** any dual standard between the campus or university community and the general community of society relative to the restraint of publication and distribution of student publications based upon alleged obscenities, "fighting words," or other illegal statements. The **Papish** decision makes it necessary that college and university administrators and their counsel review those cases relied upon by the Supreme Court in **Papish.**

In **Kois** v. **Wisconsin,**[86] the appellant was arrested for the publication of allegedly obscene pictures and an alleged "sex poem" in an underground newspaper, the one mentioned picture showing a nude man and nude woman in a sitting position accompanied by an article describing the picture as similar to those seized from a photographer of the publication. Citing **Roth** v. **United States**[87] holding that material may be considered obscene when to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interests, the court found the pictures and poem connected to the overall theme of the publication which was not obscene and was entitled to protection.[88]

In **Cohen** v. **California,** the defendant was arrested for wearing a jacket bearing the words "F..k the draft" absent any disturbance on the part of the defendant.[89] Holding that no violence was provoked by Cohen's demonstration of the expletive on his jacket and that no persons seeing it had complained or reacted hostilely to it—and interestingly, applying the **Tinker** test in rejecting an undifferentiated fear or apprehension of the

disturbance--the Supreme Court reversed Cohen's conviction on the grounds of the peacefulness of his expression and the unacceptability of basing a conviction on the mere use of a word, indeed offensive to some but not all.[90]

In deciding **Papish**, the Supreme Court also relied upon **Gooding** v. **Wilson**,[91] a case involving the reversal of the conviction of the defendant for utterances prohibited under a Georgia statute sanctioning the use of "opprobrious" and "abusive" language. The court held that, unlike the situation in **Chaplinsky**, the state courts had not limited the statute in question to apply only to "fighting words," as **Chaplinsky** defines them, but had gone beyond the sanctioning of "fighting words" as defined in **Chaplinsky**.

The "fighting words" doctrine was established by the U. S. Supreme Court in **Chaplinsky** v. **New Hampshire**.[92] In **Chaplinsky**, the Supreme Court established the proposition that there are certain narrow forms of speech, even pure in form, not protected by the First Amendment. These include not only the obscene or profane, as noted hereinabove, but also the libelous and insulting or "fighting words"--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. In upholding the conviction of Chaplinsky, the court stated that the statute under which the defendant was convicted does no more than prohibit the face to face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker--including classical fighting words, words in current use less classical but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.[93] The Court specifically held that appellants' use of the terms "damned racketeer" and "damned fascist," epithets likely to provoke the average person to retaliation, might thereby cause a breach of the peace. The decision in **Chaplinsky** establishes the right to restrain publication of such expressions, particularly under statutes held constitutional under the **Chaplinsky** decision.

In dissenting from the majority in **Papish**. Chief Justice Berger held the facts in **Papish** clearly distinguishable from the court's prior holdings in **Cohen** and **Gooding**, stating further his belief that those holdings are erroneous. The Chief Justice is of the opinion that **Gooding** [and **Rosenfeld** v. **New Jersey**[94] (also relied upon by the court)] dealt with prosecutions under criminal statutes unlike **Papish**, which dealt only with rules governing conduct on the campus of a university. The Chief Justice held the opinion that the university is not merely an arena for discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. That environment is dedicated to the end that students may learn the self-restraint necessary to functioning in a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable. On this premise, the Chief Justice stated:

> I find it a curious--even bizarre--extension of **Cohen, Gooding** and **Rosenfeld** to say that a university is impotent to deal with conduct such as that of the petitioner. Students are, of course, free to criticize the university, its faculty or the government in vigorous or even harsh terms but it is not unreasonable or violative of the constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a university or college from regulating the distribution of such obscenity does not protect the values inherent in the first amendment; rather, it demeans those values. The anomaly of the Court's holding today is suggested by its use of the now familiar 'code' abbreviation for the petitioner's foul language.[95]

Obviously, Chief Justice Berger disagreed with the majority not only in its rejection of a dual standard as applied to college and university campuses **vis-a-vis** the general community but also regarding obscenity exceptions to the First Amendment.[96]

A part of the study of Justice Berger's dissent in **Papish** is a comparison of Justice Black's dissent in **Tinker** and a consideration of Justice Black's philosophy regarding the application of the First

Amendment to the individual as he or she exists personally and **vis-a-vis** his society. Albeit cautious to attempt a summary of Justice Black's opinion regarding the application of First Amendment freedoms, I understand them to defend vigorously the right of the individual to expression and to self-exposure to expression without censorship of the substance of that expression; the important point, I believe, to be made by Justice Black is that the individual cannot, however, engage in unrestricted selection of the time, place, manner, and form of self-expression, for, indeed, these factors impact upon the rights of others.

The implications of these court opinions are even more important to college and university administrators in light of the recent opinion of the U. S. Supreme Court in **Miller** v. **California,**[97] decided on June 23, 1973, delegating to the states the authority to prescribe standards for determining obscenity and, very importantly, holding that appeal to prurient interests is no longer the sole or predominant test for the determination of obscenity.

The Necessity of Procedural Safeguards

In its decision in **Freedman** v. **Maryland,**[98] the Supreme Court affirmed the proposition first expressed in **Times Film Corporation** v. **City of Chicago**[99] that prior restraint is not unconstitutional under all circumstances and that the First Amendment does not give any person complete and absolute freedom to exhibit at least once any and every kind of expression even if it contains the basest kind of pornography, or incitement to riot, or forceful overthrow of orderly government. Rather, **Freedman** requires the establishment of procedural safeguards incident to the restraint of expression which occurs out of the necessity of enforcing the substantive right of the state, as expressed above.

The mandate of **Freedman** has been applied by the federal courts to the school setting to require that school officials should insure an expeditious review procedure incident to any restraint upon publication, including a definite period of time within which the review of submitted material will be completed, and to whom the material should be submitted. In applying the aforementioned test, the court in **Eisner** v. **Stamford Board of Education**[100] noted that school officials need not seek a judicial determination before enforcement of policies restraining certain offensive publications; nor did the court find any basis for holding that school officials must in every instance conduct an adversary proceeding before they may act to prevent disruptions which foreseeably could result from a publication, although the thoroughness of any official investigation may in a particular case influence the court's retrospective perception of the reliability and rationality of any fear of disruption by school officials. The court did, however, subject school officials to the requirement of carrying the burden of proving the offensive character of the publication according to the procedures outlined hereinabove, and suggested that restraint pursuant to such review procedures should require prior submission of materials only in cases involving contemplation of "substantial" disruption.[101] Assuming compliance by school officials with such procedural safeguards, and assuming that any restraint is justified under the applicable substantive constitutional tests, requirements for prior approval of literature to be distributed within schools will successfully withstand constitutional challenge.[102]

The Power of the Purse

It does not appear that tax supported colleges and universities are obligated to create and financially support student publications.[103] However, once the university has undertaken to establish and support certain student publications, the courts have questioned the manipulation of support to enforce restraint upon the content of such publications. In **Trujillo** v. **Love,**[104] in vacating the suspension of Ms. Trujillo for publication of a cartoon critical of the president's action on the closing of campus "pubs" and an article on the subject of student parking, the court indicated that it did not find it necessary to reach the question whether the college is obligated to provide a student newspaper, since the paper in question was in existence and existed as a vehicle for student expression rather than as an academic laboratory.[105]

More recently, this question was raised in **Joyner** v. **Whiting,**[106] involving the withdrawal of financial support from the "Echo," the student newspaper of North Carolina Central University. In the first issue of the "Echo" under Joyner's editorship, there was published a front page headline entitled "Is NCCU Still a Black School" and an article which called for a reversal of the trend toward a rapidly growing white population at NCCU, encouraging blacks to make it clear to white students that NCCU was a black campus. The president of NCCU responded to the headline and article by withdrawing funds for the publication of additional issues, noting that funds would be withheld until agreement could be reached regarding the standards to which further publications were to adhere. In his memorandum announcing his decision, the president stated, "If concensus cannot be established then this university will not sponsor a campus newspaper."[107]

On advice of counsel that support could not be temporarily suspended contingent upon the paper's meeting journalistic standards or other subjective criteria, the president irrevocably terminated the paper's financial support and refunded to each student the pro rata share of the student activity fee previously allocated to the student newspaper.[108]

The Fourth Circuit reaffirmed, noting the Supreme Court's decision in **Healy** v. **James,** and relying upon **Trujillo** v. **Love, Antonelli** v. **Hammond, Dickey** v. **Alabama State Board of Education,** and **Panarella,** that the courts have struck down every form of censorship of student publications at state supported institutions including "censorial oversight based on the institution's power of the purse."[109]

Tracking **Tinker** and **Healy,** and considering its prior decision in **Quarterman** v. **Byrd, supra,** the court noted the authority of schools to limit free and unrestricted expression to those instances where it does not materially and substantially interfere with school activities, in this instance on account of the distribution of such printed material. The record in **Joyner** demonstrated, however, the president's acknowledgment that there did not appear to have been any danger of physical violence or disruption at the university because of the publication of the headline or article in question. Although the court recognized that the message of racial divisiveness and antagonism might well have been distasteful to the president and other members of the university community, it found that the record disclosed no complaint by white faculty members or students that the paper's editorial policy incited anyone at the university to harass or otherwise interfere with them.

On the subject of the permanency of the withdrawal of support, the court held that the president's argument——that permanency does not link the ebb and flow of funds with disapproval or approval of editorial policy——overlooks the fact that one of the reasons for the withdrawal of funds was the president's displeasure with the editorial policy of the paper. The court held this to be an abridgement of freedom of the press, nonetheless real merely because of its permanency.[110]

In responding to the primary basis for the district court affirmance of the president's action, the court was constrained to approach the question whether funding of the publication by state funds necessitated a policy of total non-orthodoxy and whether that requirement had been violated by the student editor, Joyner. The court held that at the most the editorial comments advocated racial segregation contrary to the Fourteenth Amendment and the Civil Rights Act of 1964. This the court held to be insufficient to establish any violation of the Constitution's terms sufficient to overcome the First Amendment clause protecting freedom of the press. The court held that the Fourteenth Amendment and the Civil Rights Act proscribe state action that denies the equal protection of the laws, not state advocacy, thus indicating that even if the student publication were classified as a state agency, it would not be prohibited from expressing its hostility to racial integration, unless that expression abridged the line between action and advocacy marked by federal decisions. Finally, in commenting upon the necessity of a non-orthodox policy, the court held that the record disclosed no rejection by Joyner of articles that were opposed to his editorial policy.

In his dissent, Judge Field defined the real question as that of the duty of the president of NCCU to terminate the University's subsidy of the "Echo" when he had reasonable grounds to believe that the newspaper was engaged in conduct which was violative of the Constitution and laws of the United States, and, which, under the circumstances, jeopardized the university's participation in various federal funding programs necessary to its operation. Judge Field pointed out that the record in the case clearly showed the reason for termination of the subsidy to be the university's fear that continued support of the student newspaper could be construed as state action in the context of the various civil rights acts passed by the congress as well as the federal Constitution, particularly in light of the responsibility placed upon public agencies to take affirmative action to eliminate discrimination in schools.[111]

Relying upon **Lee** v. **Board of Regents of State Colleges**,[112] **Zucker** v. **Panitz**[113] and **Panarella** v. **Birenbaum**,[114] Judge Field held that the activities of the "Echo," subsidized as it was by the university, constituted state action in the area of civil rights. Judge Field vigorously disagreed with the majority that the publication of the statements in the "Echo" constituted advocacy rather than action, analogizing the Confederate flag decisions which struck down the use of the Confederate battle flag as the symbol of various public schools.[115]

The debate consuming the majority of the pages of the **Joyner** decision should not obscure the college administrator's consideration of the balance of its holding that restraint of student publications which does not meet the test of **Tinker** or those cases dealing with restraint of publications on the basis of content cannot be justified through the use of withdrawal of funds as a means of effecting restraint. The termination of subsidy may be on other grounds, including economic exigencies unrelated to the editorial policies of the student publication, or upon the mutual decision of the publication and the university that independence offers the publication freedom from those valid but perhaps burdensome requirements of administrative oversight (e.g., prior submission of materials to be published) which adversely affect the student editor's desire to enjoy total freedom of expression within the limits of the law.

Independence for Student Publications

Both the responsibilities and problems facing publicly supported colleges and universities enjoying student publications emanate from the public character of the college or university and thus of the support of the publication. Clearly, the state and its agencies have the responsibility and the authority, as discussed hereinabove, to oversee the publication and dissemination of student publications, and in this regard to require certain safeguards for the state, including prior submission of materials, to insure that the state engages in no publication of obscene, libelous, or otherwise illegal publications and to insure freedom from disruption of the activities of the state through the college or university. This authority and responsibility is conditioned strictly only upon the preservation of adequate procedural safeguards as discussed herein.

At the same time the state is also impressed with a lesser authority than the publisher in the private sector to restrict the editorial policy or content of publications since restraint of expression by the public college or university is state action regulated by the mandates of the First and Fourteenth Amendments to the U.S. Constitution.[116]

These mandates do not generally apply to private colleges and universities, which do not normally engage in state action as defined by constitutional case law. There is, of course, legal precedent which might be relied upon by a court to determine in certain situations that private educational institutions have engaged in state action, such determinations primarily involving the extent of entanglements between the state and the institution.[117]

Normally, however, the state action doctrine has not been applied to public institutions, even where some state funding for such institutions exists, thus creating less concern on the part of private

institutions about the impact of the case law discussed herein as it applies to their involvement with student organizations, publications, or other forms of expression.[118]

Although the law is far from settled whether college or university administrators are liable for the content of publicly supported student publications, I believe the aforementioned responsibilities of the state impress these officials with ultimate obligations vis-a-vis publicly supported student publications which obligations are not removed by the appointment of editorial or advisory boards. Such boards, while they may provide valuable guidance to student editors, do not assume ultimate responsibility of state officials to protect those state interests discussed herein.

The publishing arrangement which involves such an advisory board has been a common one and has been the cause of many of the problems involving the campus press and administrators over the past few years.[119] Even with the presence of the publications board, the chief administrative officer of the institution remains the real publisher under most state laws. Yet, in the majority of instances, the chief administrative officer of the institution cannot review student publications on a day-to-day basis and indeed exerts little, if any, effective control upon student editors. The maintenance of a system of prior submission with the procedural safeguards recommended in **Eisner** and **Quarterman, supra,** address legally, but not pragmatically, the responsibilities of the institution as an agency of the state. At the same time, student editors are similarly dissatisfied with such an arrangement because it does not offer true autonomy as does a truly free or independent student press.

The answer to the legal aspects of this dilemma is obviously a totally independent student press. However, university counsel frequently are faced, when recommending this alternative, with arguments addressed to the possible financial exigencies resulting from a move toward independence after long years of total university support.

Solutions do exist for this dilemma, including the purchase by the institution of advertising, stepped up efforts on the part of the publication itself to gain advertising revenue, and perhaps even the purchase by the institution or its students of bulk subscriptions. Such matters are delicate and should be reviewed in light of state laws governing the expenditure of public funds. In many states, certain of these funds, such as student activity or service fees, are impressed with fewer restrictions on expenditure than are appropriated revenues and may be spent for any purpose consistent with the educational mission of the university. In such a situation, some of the types of "support" for independent student publications mentioned above should be legally proper.

Assuming the resolution of financial dilemmas through the means noted hereinabove, the legal establishment of an independent student press involves the organization, usually incorporation, of the student newspaper as a legal entity separate from the college or university. Where the independent press desires to continue using the established name of publications of long standing, the institution may grant the publishing entity a revocable license to use the name of the publication, being cautious to retain control over the use of the name by those entities other than the licensee. Finally, the publishing entity should agree to indicate its separate corporate existence and the separation of its opinions from the official position of the university.

It may be proper under the laws of many states for the institution to transfer certain resources to the independent publication——e.g., to assign accounts receivable due the institution from advertisers. Such action must, however, be consistent with applicable state law. Such transfers of assets of course add to the probability of financial success, especially in the early months and years of independence.

Finally, as permitted by state law, the institution may enter into contracts for the purchase of space in the independent publication(s), purchasing that space consistent with the institution's authority under state law to expend its funds. As noted by

Messrs. Duscha and Fischer,[120] the institution must be careful not to pay higher than normal subscription prices for the paper or engage in the paying of abnormal advertising charges for the purchase of space in the independent publication.

It is my opinion that, legally, the institution may in this and other ways contribute to the financial success of the independent publication, subject, of course, to applicable state law. However, direct and indirect financial support of the publication affects the legal separation of the publication from the university. I do not believe, as Duscha and Fischer suggest, that the paper must not receive any subsidy from the institution through such things as free office space but rather believe that the provision of such subsidies should be carefully examined to establish to what extent they affect the separation of the publication from the institution. It may be permissible under certain state laws for the institution to allow outside organizations the utilization of university facilities. However, as Duscha and Fischer suggest, free use of such facilities, equipment, or other resources amounts to a subsidy which might affect the character of the publication and therefore the institution's responsibility vis-a-vis the publication.

Duscha and Fischer mention approximately eleven examples of independent student publications, including six which are discussed in some detail. These examples provide an analysis of various degrees of legal separation between the institution and student publications, combinations of which may be used in the transition from total support to the accomplishment of total independence for student publications.

Conclusion

Conclusions are normally inadequate summaries of the information contained in what the author hopes is a comprehensive discussion of an important subject matter. Conclusions should, therefore, be discouraged where reliance upon them as summaries of a full discussion of the subject matter might misguide or inadequately inform the student of the article. Because the factual situations faced by college and university administrators in dealing with student organizations and student publications are many and varied, no summary legal advice on the legal aspects of student organizations and student publications is possible without sacrificing the responsibility of counsel to carefully advise the college or university.

It is possible to say that the "Tinker test" has been extended to situations involving the recognition of student organizations and the regulation of student publications and that, since **Tinker**, the First Amendment guarantees of freedom of expression have been extended to cover two additional forms of expression in the school setting. This extension of the law should not, however, any more than should the basic principles of the **Tinker** case, cause college and university administrators to abandon their responsibilities efficiently and effectively to manage their institutions toward the accomplishment of their stated objectives and goals. Rather, the case law should be studied and adhered to, **according to its terms**, to aid the institution in promoting freedom of expression within constitutionally sound limits.

FOOTNOTES

1. 258 F. Supp. 971 (S.D. Iowa 1966), aff'd 383 F.2d 988 (8th Cir. 1967), rev'd 393 U. S. 503 (1969).

2. 363 F.2d 744 (5th Cir. 1966).

3. It is interesting to note in examining the defenses raised by the school that the letters sent by the school notifying parents of the suspensions in question made no mention of any forecast of disruption by school officials.

4. **See also, Blackwell** v. **Issaquena County Board of Education,** 363 F.2d 749 (5th Cir. 1966); **Shanley** v. **Northeast Ind. Sch. Dist., Bexar County, Texas,** 462 F.2d 960 (5th Cir. 1972); **American Civil Liberties Union of Virginia** v. **Radford College,** 315 F. Supp 893 (W.D. Va. 1970); **Norton** v. **Discipline Committee of East Tennessee State University,** 419 F.2d 195 (6th Cir. 1969); **Esteban** v. **Central Missouri State College,** 415 F.2d 1077 (8th Cir. 1969); **Clemson University Vietnam Moratorium Committee** v. **Clemson University,** 306 F. Supp. 129 (D. S.C. 1969).

5. 363 F.2d at 748.

6. **Id.,** at 749.

7. 363 F.2d 749 (5th Cir. 1966).

8. 274 U. S. 357 (1927).

9. 341 U. S. 494 (1951).

10. 363 F.2d at 754.

11. As is known to high school and college administrators familiar with the **Tinker** case, it also arose in a high school setting.

12. 393 U. S. at 505–506.

13. **Id.,** at 508.

14. It is interesting to note the Supreme Court's citation to **Terminiello** v. **Chicago,** 337 U. S. 1 (1949).

15. Mr. Justice Fortas in **Tinker** at 509, citing **Burnside** v. **Vyars, supra,** at 749. It should be noted that school officials admitted in their testimony that their regulation was directed against the principle of the demonstration itself and their feeling that the schools are no place for demonstrations—that disputes with the way elected officials were handling foreign affairs should be settled at the ballot box and not in the halls of public schools. It is also interesting to note the Court's comment that at the time of the **Tinker** decision in the district court, the United States involvement in Vietnam had become the subject of a major national controversy for some time and debate over the Vietnam was had become vehement in many localities, including protest marches held in Washington, and draft card burnings throughout the country. This period of tension was obviously not sufficient to sway the Court to affirm any apprehension on the part of school officials of disruption because of events

nationally surrounding the Vietnam war and the period of national tension it created. This point should be remembered where school officials attempt to use general situations of tension to justify restraints of speech at an early point in time. 393 U. S. at 509–10 n. 3, 4.

The **Tinker** case could have been decided on the ground of equal protection, since the record demonstrated that students in some of the schools wore buttons relating to political campaigns and some wore the Iron Cross yet the regulation in question prohibited only the wearing of armbands. **See also, Stacy** v. **Williams,** 306 F. Supp. 963 (N.D. Miss 1969), aff'd 446 F.2d 1366 (5th Cir. 1971), noting that once expression or activities are allowed for one, they must be allowed for all, unless justifiable on the grounds such as those approved in **Tinker.**

16. The "reasonableness" rule was resurrected in the school setting in **Dickey** v. **Alabama State Board of Education,** 273 F. Supp 613 (M.D. Ala. 1967), and appeared again at the supreme court level in **West Virginia State Board of Education** v. **Barnette,** 319 U. S. 624 (1943).

17. A discussion of state action appears, **infra.**

18. 393 U. S., at 506.

19. **See, Tinker, supra; Stacy** v. **Williams, supra,** 306 F. Supp at 971; **Brooks** v. **Auburn University,** 412 F.2d 1171 (5th Cir. 1969); **American Civil Liberties Union of Virginia** v. **Radford College,** 315 F. Supp 893 (W.D. Va. 1970).

20. **See, Tinker, supra; American Civil Liberties Union of Virginia** v. **Radford College, supra,** at 896.

21. **Blackwell** v. **Issaquena County Board of Education, supra; Shanley** v. **Northeast Ind. Sch. Dist., Bexar County, Texas, supra; American Civil Liberties Union of Virginia** v. **Radford College, supra; Norton** v. **Discipline Committee of East Tennessee State University, supra; Esteban** v. **Central Missouri State College, supra; Clemson University Vietnam Moratorium Committee** v. **Clemson University, supra.**

22. 408 U. S. 169; 92 S.Ct. 2338 (1972).

23. **Healy** v. **James, supra,** 92 S. Ct. at 2350; **Shanley** v. **Northeast Ind. Sch. Dist., supra,** at 974.

24. 319 F. Supp 113 (D. Conn. 1970).

25. 319 F. Supp, at 116.

26. 445 F.2d 1121, 1131–1132 (2d Cir. 1971).

27. **See also, Esteban** v. **Central Missouri State College,** 415 F.2d 1077 (8th Cir. 1969); **Barker** v. **Hardway,** 283 F. Supp 228 (S.D. W.Va. 1968), aff'd 399 F.2d 638 (4th Cir. 1968); **Speake** v. **Grantham,** 317 F. Supp 1253 (S.D. Miss. 1970).

28. 92 S. Ct. at 2349–50.

29. **Id. See also, Stacy** v. **Williams, supra,** where the Fifth Circuit noted that to satisfy the clear and present danger test there must be a finding by proper authority either that immediate serious violence (or other substantive evil) was to be expected or was advocated, or that the present conduct furnished reason to believe that such advocacy was then contemplated.

30. 92 S. Ct. at 2350, n. 20.

31. 452 F.2d 564 (5th Cir. 1971).

32. **Id.**, at 565

33. **See e.g., Brooks** v. **Auburn University**, 296 F. Supp 188 (M.D. Ala. 1969).

34. 452 F.2d, at 566–567.

35. **Id. See also, American Civil Liberties Union of Virginia** v. **Radford College, supra.**

36. **Id., Healy** v. **James, supra**, 92 S. Ct. at 2350.

37. 452 F.2d 567; **cf. ACLU** v. **Board of Education**, 359 P.2d 45 (S. Ct. Cal. 1961), which declared unconstitutional a requirement that organizations seeking to use university facilities sign a loyalty oath. **See also, Garvin** v. **Roseman**, 455 F.2d 233 (6th Cir. 1972); **Wood** v. **Davison**, 351 F. Supp 543 (N.D. Ga. 1972) where the district court, relying primarily on **Healy**, declared that the University of Georgia's denial of facilities to the Committee on Gay Education for the purpose of holding a dance was an unconstitutional restraint on First Amendment activities. The court held that although the university has the right to adopt and enforce reasonable regulations, it may not deny access to its facilities unless: (1) there is a refusal by the organization to abide by reasonable campus regulations; (2) there is a demonstrated danger of violence or disruption; or (3) the meeting would otherwise violate state or federal law. The holding in **Wood** follows in the main thrust of **Healy**, noting that other activities violative of state and federal law are also included in any test governing the restraint on use of campus facilities.

38. 344 F. Supp 1296 (N.D. Fla. 1972).

39. In the trial of the case, testimony included references to statements of the National Executive Committee of the YSA specifying that "[T]he correct revolutionary strategy is one that permits the involvement of the student masses. Meaingful disruption of the functioning of the university is the work not of handfuls, but of masses." 344 F. Supp at 1301.

40. **See Center for Participant Education, et al.** v. **Marshall, et al.**, 337 F. Supp 126 (N.D. Fla. 1972), appeal dismissed, F.2d (5th Cir. 1972).

41. 344 F. Supp, at 1307

42. **Fluker** v. **Alabama State Board of Education**, 441 F.2d 201 (5th Cir. 1971).

43. **See University of Southern Mississippi MCLU** v. **University of Southern Mississippi, supra; see also Webb** v. **State University of New York**, 125 F. Supp 910 (N.D. N.Y. 1954).

44. **See American Civil Liberties Union** v. **Radford College, supra.**

45. **Healy**, v. **James, supra**, 92 S.Ct., at 2348.

46. **Fluker** v. **Alabama State Board of Education, supra**, at 208; **Ferguson** v. **Thomas, supra; Foster** v. **Board of Education**, 431 F.2d 648 (5th Cir. 1970); **Barker** v. **Hardway**, 283 F. Supp 228 (S.D. W.Va. 1968).

47. No. 72–1630 (4th Cir., April 10, 1973).

48. U. S., 93 S.Ct. 1197 (1973).

49. 273 F. Supp 613 (M.D. Ala. 1967).

50. 273 F. Supp at 617.

51. **Id.**

52. **Id.** at 618, citing **Burnside v. Byars, supra.**

53. 317 F. Supp 688 (N.D. Tex. 1970).

54. **Id.**, at 690.

55. The court's opinion was directed primarily at Texas Tech's allegation that the publication was obscene.

56. 308 F. Supp 1329 (D. Mass. 1970).

57. **Id.**, at 1336.

58. 453 F.2d 54 (4th Cir. 1971).

59. **Id.**, at 55.

60. **Id.**, at 55–56.

61. **Eisner v. Stamford Board of Education,** 440 F.2d 803 (2d Cir. 1971).

62. **See also, Butts v. Dallas Ind. Sch. Dist.,** 436 F.2d 728, 731 (5th Cir. 1971); **Norton v. Discipline Committee of East Tennessee State University,** 419 F.2d 195, 199 (6th Cir. 1969).

63. **See also, Scoville v. Board of Education of Joliet Tp. H. S. Dist. 204, etc., Ill.,** 425 F.2d 10 (7th Cir. 1970); **Shanley v. N. E. Ind. Sch. Dist., Bexar County, Texas,** 462 F.2d 960 (5th Cir. 1972); **Trujillo v. Love,** 322 F. Supp 1266 (D.C. Colo. 1971); **Panarella v. Birenbaum,** 327 N.Y.S. 2d 755 (N.Y. App. Div. 1971); **Braughm v. Freienmuth,** 343 F. Supp 487 (D.Md. 1972); **Jacobs v. Board of School Commissioners of City of Indianapolis,** 349 F. Supp 605 (S.D. Ind., 1972); **Sullivan v. Houston Ind. Sch. Dist.,** 307 F. Supp 1328 (S.D. Tex. 1969); **cf. Katz v. McAulay,** 438 F.2d 1058 (2d Cir. 1971) cert denied 405 U. S. 933; **Graham v. Houston Independent School District,** 335 F. Supp 1164 (S.D. Tex., 1970).

64. U. S. 93 S. Ct. 1197 (1973).

65. **cf. Duke v. North Texas State University,** 469 F.2d 829 (5th Cir. 1972), an interesting case involving the failure to renew the appointment of a female instructor at North Texas State University on the ground of her profane, offensive and grossly disrespectful remarks at various gatherings, the subject of her remarks being the Board of Regents and the administration of the University. The court, after citing the general guidelines in **Healy v. James,** and other cases, held that these remarks were justifiably the predicate for failure to renew her appointment for the following year. The court held

specifically at 840 that: ". . . As a past and prospective instructor, Mrs. Duke owed the university a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at administrators of the university. By her breach of this duty the interests of the university out weighed her claim for protection." The court elaborated at some length upon the testimony of other faculty members which stated that her remarks including her obscenities constituted irresponsible, unwise, and unreasonable behavior which reflected on all teachers at North Texas State, and included statements which, in the opinion of the president of the university, maligned his faculty and were not true of the university. The case is interesting as a comment upon publications and organization cases in that it represents a case involving speech where **because of the character of the plaintiff's responsibilities to the university, the invasion of First Amendment rights was considered proper as in furtherance of the interests of the university in its reputation and that of its faculty.** Nowhere in the facts of the case does actual disruption appear to have been established.

66. 315 U. S. 572 (1941); see, **Eisner** v. **Stamford Board of Education,** 440 F.2d 803 (2d Cir. 1971); **Papish** v. **Board of Curators of the University of Missouri, supra; Quarterman** v. **Byrd, supra; Close** v. **Lederle,** 424 F.2d 988 (1st Cir. 1970) cert. denied 400 U. S. 903 (1970).

67. 317 F. Supp at 690.

68. **See also, Vought** v. **Van Buren Public Schools,** 306 F. Supp 1388 (E.D. Mich. 1969), where the court predicated its overturning of a suspension on equal protection grounds where the school's suspension of the plaintiff consisted of the use by plaintiff of certain "four letter words," evidently limited to the words "f..k" and "mother f....r" in a student magazine on the ground that the school in its library, in issues of Harpers Magazine, had articles containing the same words and had in fact assigned books, at least one of which was introduced into evidence at an administrative hearing, containing the same word. Although, in my opinion, proof of the presence in a school library of materials containing certain words similar to those contained in student publications is not necessarily dispositive of an equal protection claim, such evidence is quite relevant in the assertion of any claim of denial of equal protection and is most forceful where materials containing similar language are permitted for distribution under identical circumstances as those sought to be restrained. See **Channing Club, supra; see also, Koppell** v. **Levine,** 347 F. Supp 456 (E.D. N.W. 1972).

69. 453 F.2d 54 (4th Cir. 1971), at 58. **See also, Ginnsburg** v. **New York,** 390 U.S. 629 (1968); **Tinker** v. **DesMoines School District, supra; Press** v. **Pasadena Ind. Sch. Dist.,** 326 F. Supp 550, 565 (S.D. Tex. 1971),speaking directly to a difference between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university; **Schwartz** v. **Schuker** 298 F. Supp 238, 242 (S.D. N.Y. 1969); **Baker** v. **Downy City Board of Education,** 307 F. Supp 517 (C.D. Cal. 1969).

70. 317 F. Supp 138 (D.C. Md. 1970).

71. 394 U. S. 576 (1969).

72. 376 U. S. 254 (1964).

73. **Korn** v. **Elkins, supra,** at 142, citing **Dickey** v. **Alabama State Board of Education, supra.**

74. **See, e.g., People** v. **Radich,** 26 N.Y.2d 114. 257 N.E.2d 30, 308 N.Y.S.2d 846 (N.Y. 1970).

75. U. S. 93 S. Ct. 1197 (1973).

76. 93 S. Ct., at 1199.

77. 464 F.2d 136 (8th Cir. 1972).

78. **Id.**, at 145.

79. **Papish, supra,** at 1199, citing **Kois** v. **Wisconsin,** 408 U. S. 229 (1972); **Gooding** v. **Wilson,** 405 U. S. 518 (1972); **Cohen** v. **California,** 403 U. S. 15 (1971); **Cason** v. **Columbus,** _____ U. S. _____, 93 S.Ct. 565 (1972); **Rosenfeld** v. **New Jersey,** 408 U. S. 901 (1972); **Lewis** v. **New Orleans,** 408 U. S. 913 (1972); **Brown** v. **Oklahoma,** 408 U. S. 914 (1972).

80. 93 S. Ct., at 1199, n. 6.

81. Another problem in the area of equal protection, as well as the application of First Amendment principles, involves the accepting of paid advertisements by publicly supported student publications. In **Zucker** v. **Panitz,** 299 F. Supp 102 (S.D. N.Y. 1969), the court denied a high school newspaper the right to refuse paid editorial advertisements on the subject of opposition to the war in Vietnam. The court found that the school had permitted other articles relative to the draft and the war in other portions of the newspaper, contrary to the assertions of the school that the paper was established for the discussion of news relative only to activities of the school. Citing the **Tinker** test, the court held that the newspaper appeared to have been open to the free expression of ideas in the news and editorial columns as well as in letters to the editor. Under such circumstances, the court held it patently unfair in light of the free speech doctrine to close to students a forum which they might deem most effective to the presentation of their ideas. The opinion did not directly hold that a public newspaper has an affirmative duty to grant access to its pages through paid advertising; rather, the court predicated its ruling upon the denial of equal protection arising from the school's permitting articles such as that requested for paid advertisement in other sections of the paper.

See also, Lee v. **Board of Regents,** 306 F. Supp. 1097 (W.D. Wis. 1969), **aff'd,** 441 F.2d 1257 (7th Cir. 1971). In **Lee,** the court held, where the defendants admitted that the newspaper constituted a forum for the dissemination of news and the expression of opinion, that "[A]s such a forum, it should be open to anyone who is willing to pay to have his views published therein——not just to commercial advertisers." at 1101. The court relied heavily upon **New York Times Company** v. **Sullivan, supra; Wirta** v. **Alameda–Contra Costa Transit Dist.,** 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (Cal. 1967) (editorial advertisements on a city bus line); **Kissinger** v. **New York City Transit Auth.,** 274 F. Supp. 438 (S.D. N.Y. (1967) (posters in a New York subway) in noting the obligation to accept editorial advertisements and pointing out that restrictions beyond this under color of state law are not supportable except in situations involving a clear and present danger. The basis of the court's holding, however, as was true in **Zucker,** was based upon the denial of equal protection resulting from the acceptance of commercial advertising while denying editorial advertisements.

Compare, **Columbia Broadcasting System, Inc.** v. **Democratic National Committee,** 41 L.W. 4688 (May 29, 1973), in which the U. S. Supreme Court held that the public interest standard of the Federal Communications Act which incorporates First Amendment principles does not require broadcasters to accept editorial advertisements. The court also held that the FCC was justified in concluding that the public interest in having access to the "market place of ideas" would not be served by ordering right of access to advertising time, under risk of monopolization by those with the most monetary resources.

82. Compare **Buchanan** v. **Oregon,** 436 P.2d 729 (Ore. 1968) and **United States** v. **Caldwell,** 408 U. S. 665 (1972).

83. See **Korn** v. **Elkins**, 317 F. Supp 138 (D.C. Md. 1970); **Antonelli** v. **Hammond**, 308 F. Supp 1329 (D. Mass.1970), **supra**; cf. **Zucker** v. **Panitz**, 299 F. Supp 102 (S.D. N.Y. 1969).

84. No. 73–788–Civ. **cf.**, (S.D. Fla. 1973).

85. See also, **Trujillo** v. **Love, supra**, 322 F. Supp 1266 (D.C. Colo. 1971), where the court held that it was not necessary to reach the question whether, if a laboratory paper existed as a part of the academic curriculum in journalism, and under the control of the journalism department, a college or university may decline to finance a newspaper solely for the expression of student opinion or whether, once established, such a project may be abandoned.

86. 408 U. S. 229 (1972), appealed to the Supreme Court from the Supreme Court of Wisconsin, 51 Wis. 2d 688, 188 N.W. 2d 467 ( ).

87. 354 U. S. 476 (1957).

88. **Also citing Thornhill** v. **Alabama**, 310 U. S. 88 (1940) Mr. Justice Douglas concurred in a serious attack upon obscenity exceptions to the First Amendment, stating that under obscenity statutes men are sent to prison under definitions which they cannot understand and on which lower courts and members of the Supreme Court cannot agree. The Justice also noted that the vague unbrella of obscenity laws were used in the **Kois** case in an attempt to run a radical newspaper out of business and that if obscenity laws continue to enjoy an uneven and uncertain enforcement then the vehicle has been found for the suppression of any unpopular tract.

89. 403 U. S. 15 (1971).

90. It is interesting to note the candor expressed by the court including within its opinion the full spelling of the expletive used by the defendant. Compare the court's majority opinion in **Papish** where it declines to express the words used by the petitioner although the philosophy of its opinion calls strongly for the dissemination of ideas no matter how offensive to good taste as a mandate of the First Amendment. The dissenters in the **Cohen** case, including Justice Black, held Cohen's absurd and immature antic to be mainly conduct and not speech under **Street** v. **New York**, 394 U. S. 576 (1969); **Cox** v. **Louisiana**, 379 U. S. 536 (1965); and **Giboney** v. **The Empire Storage Company**, 336 U. S. 490 (1949), and held the case factually within the sphere of **Chaplinsky** v. **New Hampshire**, 315 U. S. 568 (1942), a case discussed herein and one supporting a conviction for the use of words which provoke a breach of the peace.

91. 405 U. S. 518 (1972).

92. 315 U. S. 572 (1942).

93. **Id.**, at 573.

94. 408 U. S. 901 (1972).

95. 93 S.Ct., at 1200.

96. Compare the Supreme Court's application of the rejection of a dual standard in **Papish** and Justice Berger's comment thereon with the Court's decision in **Healy** and **Tinker**. In the latter decisions, the Supreme Court, in speaking to the application of those cases defining advocacy directed to inciting lawless action and thereby without the scope of First Amendment protections

[e.g., **Brandenburg** v. **Ohio**, 395 U. S. 444 (1969)] held that such cases must be applied within the special characteristics of the school environment, where the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature but is applicable to prohibit actions which materially and substantially disrupt the work and discipline of the school. It would appear that the court did indeed in **Tinker** and **Healy** establish at least a limited dual standard where expression provokes disturbances or disruption. It would seem that the court's holding would affect the application of the **Chaplinsky** "fighting words" standard to the campus, and could in fact argue for a limited "dual standard."

97. ____ U. S. _____, 93 S.Ct. 2607 (1973).

98. 380 U. S. 51 (1965).

99. 365 U. S. 43 (1961).

100. 440 F.2d 803 (2d Cir. 1971).

101. In accord, **Quarterman** v. **Byrd**, 453 F.2d 54 (4th Cir. 1971).

102. The regulation in question in the **Eisner** case specified:

> Distribution of Printed Matter: The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations: No person shall distribute any printed or written matter on the grounds of any school or in the school building unless the distribution of such materials shall have prior approval by the school administration. In granting or denying approval the following guidelines shall apply: No materials shall be distributed which, either by content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

The second circuit approved this regulation except for the first paragraph, which was impliedly approved on the condition that the procedural safeguards recommended by the court be added and that the regulation not attempt to authorize punishment of students who publish literature that under the policy may be censored, lest students be left to guess at their peril the thrust of a policy in a specific case, with the resultant intolerable chill on First Amendment activity. **See also Korn** v. **Elkins, supra,** 317 F. Supp 138 (D.C. Md. 1970).

It should be noted, in commenting upon the **Eisner** decision and specifically the school's regulation, that it is advisable that if written regulations exist, such regulations specify within the context of the cases referred to herein those forms of expression prohibitive. It should be remembered that where written regulations merely attempt to prohibit "offensive" language or provide other general and ambiguous standards, they are subject to the same attacks for vagueness and overbreadth as have succeeded against student conduct regulations.

103. **Stacy** v. **Williams, supra; cf. Trujillo** v. **Love, supra.**

104. **Id.**

105. The court also concluded that it was not necessary to reach the question whether, if a laboratory paper existed as a part of the academic curriculum in journalism, and under the control of the journalism department, the college may decline to finance a newspaper for the expression of student opinion or whether, once established, such a project may be abandoned.

106. 341 F. Supp 1244 (M.D. N.C. 1972), **rev'd** 477 F.2d 456 (4th Cir. 1973).

107. **Id.** at 459.

108. No action was taken to bar the publication of any privately funded newspaper, and several issues of the "Echo" were published without the university's financial support; however, the court's opinion indicates that the "Echo" experienced financial difficulties resulting from the withdrawal of university funds. Initially, the court noted, as has been discussed hereinabove, that once a student newspaper is established by a college or university, its publication cannot be suppressed because college officials dislike its editorial comment (citing **Panarella** v. **Birenbaum, supra.**).

109. **Joyner,** 477 F.2d at 460.

110. **Id.** at 462.

111. Civil Rights Act of 1964, Title VI, Sec. 601, 42 U.S.C. 2000d, **et seq.; See also,** Higher Education Guidelines, Executive Order 11246, U.S.D.H.E.W. Office of Civil Rights (1973).

112. 441 F.2d 1257 (7th Cir. 1971).

113. 299 F. Supp 102 (S.D. N.Y. 1969).

114. 327 N.Y.S. 2d 755 (S.Ct. App. Div.), 37 A.D. 2d 987 (1971); **aff'd** 32 N.Y. 2d 108, 296 N.E. 2d 238 (N.Y. 1973).

115. See **Smith** v. **St. Tammay Parish School Board,** 316 F. Supp 1174 (E.D. La. 1970), aff'd 448 F.2d 414 (5th Cir. 1971).

116. **See, Wright, The Constitution on the Campus,** 22 Vanderbilt L.R., 1027, 1031 (1969); Freund, et al., **Constitutional Law,** Vol. 2, 2d Ed. (Little Brown and Company 1961) p. 881, et seq.; Civil Rights Cases, 109 U.S. 3 (1833).

117. **See, Moose Lodge No. 107** v. **Irvis,** 407 U. S. 163 (1972); **Burton** v. **Wilmington Parking Authority,** 365 U. S. 715 (1961); **Amalgamated Food Employees Union, Local 590** v. **Logan Valley Plaza,** 391 U. S. 308 (1968); **Coleman** v. **Wagner College,** 429 F.2d 1120 (2d Cir. 1970).

118. **See also, Columbia Broadcasting System, Inc.** V. **Democratic National Committee, supra,** 41 L.W. 4688 (May 29, 1973) where the Supreme Court held that the public interest standard of the Federal Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements.

In the series of three cases, the Supreme Court held that no private individual or group has a right of access to broadcast facilities, even under the provisions of federal legislation. Notwithstanding the public interest in having access to the "market place of ideas and experience," the court held that such public interest would not be served by ordering a right of access to advertising time, especially given the substantial risk that such a system might be monopolized by those with substantial resources. The case dramatically demonstrates the burden placed upon public agencies which are vested with a greater responsibility to allow public access to their facilities and media.

119. **Duscha** and **Fischer, The Campus Press: Freedom and Responsibility,** American Association of State Colleges and Universities (1973), p. 15.

120. **Id.,** at p. 18.

LOWERING THE AGE OF MAJORITY—SOME POSSIBLE RAMIFICATIONS*

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The one development which has the potential for the greatest impact upon higher education since the landmark **Dixon**[1] decision and the subsequent landslide of student rights cases is the lowering of the age of majority.

During the dozen years since the **Dixon**[2] case, students have pressed for and received judicial recognition of their constitutional rights with the courts now agreeing unanimously that while no one sheds his constitutional rights when he enters the campus gates neither does he acquire any special privileges.[3] During that same period of time, pressure has also been mounting in the political arena to lower the age of majority from the traditional age of twenty-one to eighteen.

Eighteen year olds have long been able to vote in some states, and the fact that they have been required to serve in the armed forces has given much credence to the argument that they should be accorded legal adult status with full capacity to make their own contracts and deeds and to transact business generally. The move toward lowering the age of majority in this country was accelerated greatly by the ratification of the Twenty-Sixth Amendment to the Federal Constitution, which gave eighteen year olds the right to vote in both state and federal elections. As a result, legal adult status is now accorded to individuals under twenty-one in a plurality of states. Within the past several years, at least twenty-two states have lowered the age of majority to eighteen.

This change has many ramifications for higher education. Instead of the majority of students' being minors, colleges are filled with practically all adult students. This inherently causes both the student and the institution to have a perspective different from that which was formerly held. Aside from the lessening of in loco parentis applications, other ramifications include residency as related to out-of-state tuition, dormitory residency requirements, student records, student financial support, and tort liability. It is reasonable to say that almost all aspects of higher education may be affected either directly or indirectly by this change.

Demise of In Loco Parentis

Probably the most obvious ramification is the final Demise of In Loco Parentis. That concept no longer has valid legality in higher education.[4] A virtual floodtide of court cases[5] has been handed down which affirms the rights of students and which furthers the demise of that doctrine. However, the death of long-held concepts and traditions is a slow and painful process. While many colleges and universities may well accept the fact that in loco parentis is legally dead, there is still a built-in resistance to completely abandoning it.

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* This presentation was based upon a paper prepared for the Council of Student Personnel Associations in Higher Education.

Administrators in higher education are not entirely to blame for this reluctance, for they are well aware of societal pressures which may call for the continued reliance upon the doctrine. On the other hand, court decisions have caused an awareness among administrators that they are liable for their actions, and as a result many, if not most, do not relish the acceptance of the responsibilities which attach to that doctrine.

With the lowering of the age of majority, practically all college students will be adults, a fact which should completely seal the doom of in loco parentis (according to a strict interpretation of the concept). Certain humanitarian features of that concept such as the willingness to assist students in any way possible in order to meet their needs as human beings will and should remain. But the legal relationship between the student and the institution will probably best be described as one which encompasses a combination of the various theories including contract, fiduciary, constitutional, and in loco parentis, insofar as the humanistic aspect is concerned.

Students will be forced to accept the responsibilities which their newly acquired adult status entails. They can then sue and be sued. They will have a degree of awareness of their rights and responsibilities that was not present or needed before their new-found status.

The lowering of the age of majority may well be a major factor leading to the elimination of many student personnel functions which border upon in loco parentis. Examples of these functions include the supervision of student activities, fraternities, and sororities. The elimination of the sponsorship of student publications is already under way in some institutions. Others are turning away from the practice of officially recognizing student organizations. Lewis Mayhew goes so far as to suggest that the elaborate system of a dean of student organizations, directed activities, and directors of counseling, testing, guidance, housing, and health services will probably become obsolete in the future.[6]

Residency and Out-of-State Tuition

Probably the most significant ramification of the lowering of the age of majority is the question of "residency" of a student relative to out-of-state tuition charges. Since a lowering of the age of majority to eighteen will classify almost all college students as adults, they may be able to obtain a legal residence in the state where they attend college and thereby avoid the higher out-of-state tuition payments.

The ability to gain legal residency in a state has tremendous ramifications insofar as finances are concerned. Out-of-state tuition may be eliminated in a great many instances if a student is able to obtain a legal residence in the state in which the college or university is located.[7] If students can easily gain legal residence status and the out-of-state tuition is therefore eliminated, then the financial loss to the institution will have to be compensated by other means. Tuition fees will probably be higher, and this will tend to limit educational opportunities within a state for many who may not be able to afford the increased costs.

The United States Supreme Court, just two weeks ago today, in **Vlandis** v. **Kline**[8] held that the due process clause does not permit a state (Connecticut in this case) to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of **a permanent and irrebuttable presumption of nonresidence,** when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination.

The appellees in the case did not challenge, nor did the court invalidate the option of the state to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition and fees than do bona fide residents.

The Court stated:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.
>
> We hold only that a permanent irrebuttable presumption of nonresidence--the means adopted by Connecticut to preserve that legitimate interest--is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.[9]

The Court even suggested that relevant criteria in determining in-state status could include year-round residence, voter registration, filing tax returns, property ownership, applying for drivers license or car registration, marital status, vacation employment, etc.

It remains to be seen what financial effect this decision will have upon higher education. It appears that a year's residency requirement while in student status may be the maximum time that out-of-state students can be kept in that category before allowing them the opportunity to prove in-state status. Whether large numbers of students will take advantage of this opportunity is an unknown factor. However, I think that it is safe to conclude that the potential loss of revenue to public institutions is substantial.

The age of majority as related to the legal residency status of a student can have ramifications upon private colleges and universities as well as public institutions. If students are able to gain a domicile while attending college, then private schools may possibly benefit where state law provides public funds to those institutions enrolling in-state students. This may especially benefit the institution which attracts a large portion of its student body from other states, since after the required residency period, probably one year or less, all out-of-state students at private schools will be eligible to apply for in-state status. The argument can be made that this may allow the institution to lower its fees and thus possibly attract more students. It may be further argued that, if the private schools can then attract more students and thus relieve the state of its responsibility for providing the total cost of education, this will allow the state to use this savings to offer more scholarship aid to needy students.

Dormitory Residence Requirements

Another ramification of the lowering of the age of majority is that of dormitory residence requirements. In recent years, rules requiring students to live in college dormitories have come under attack, and several important court decisions have resulted. It has been held that public colleges and universities may not require students to live in dormitories simply to increase the revenue of the housing system.[10]

The case, which gives rise to speculation as to how dramatic an effect the lowering of the age of majority may have upon dormitory residency requirements and subsequent loss of revenue to the college, occurred in Louisiana and was decided by the same judge who decided the **Pratz**[11] case, which was upheld by the U. S. Supreme Court.[12] Although another question was present in this case, the issue which is pertinent to us today concerns requiring students who have reached the age of majority to live in college dormitories. The court[13] held that a university regulation requiring students under twenty-three years of age to live on

campus constituted an unconstitutional classification of students since there was no showing of a reasonable relationship between requiring twenty-one and twenty-two year old students (who had reached the age of majority in Louisiana) to live on campus and the university educational process. The validity of the "living and learning" concept was not ruled upon in the case; however, the court declared that, insofar as the implementation of that concept in the instant case required students of full legal majority and returning military veterans to live on campus, it was not reasonably related to the educational process.

In view of this holding, the question can legitimately be raised as to what would be the difference, if any, if the age of majority were eighteen instead of twenty-one, as was the fact in this case. Logic seems to imply that no difference can be made unless the living and learning concept can be proven related to age. Certainly, if this line of reasoning is accepted by the courts, then the effect of the lowering of the age of majority will be felt in this important aspect of housing. Since very few college students are below the age of eighteen, dormitory residence requirements in those states with an age of majority of eighteen seem to be in jeopardy. This will confuse the problem already faced by many institutions whose dormitories are operating at below capacity and who are losing much needed revenue in the process. The burden upon the colleges will then be either to justify the living and learning concept by relating it to age or to make dormitory living so attractive that students will voluntarily seek to live in them rather than be coerced.

Student Records and Reports to Parents

Another ramification of the lowering of the age of majority is that which concerns student records and the release of information contained in those records to parents, guardians, and/or others. Institutions of higher education may not pry unnecessarily into the personal affairs of a student, and the college may not reveal to others information concerning its students, unless it has a proper basis for doing so. Although a student may sign a release when he gives the school information, he does not necessarily release it for all purposes. Certain parts of a student's record are confidential, and unless there is an "overriding legitimate purpose" or a "need to know," then such items are not intended to be disclosed without specific authorization.

Traditionally, many colleges regularly mail grade reports to parents. In addition, many colleges notify parents if the student is involved in any disciplinary action. If students legally hold adult status at age eighteen, then there may be no justification for the disclosure of such information to parents or guardians unless permission is granted by the student for such disclosure.

Another aspect of reports to parents concerns information which may be obtained in counseling sessions or in the student health services center. Information acquired in a counseling or health center relationship may be deemed necessary for parents of minors to know, but such would not necessarily be the case for an adult. The lowering of the age of majority to eighteen will eliminate much of the reporting which now is done to parents. Since the college will for all practical purposes be dealing with an adult student body, the continued efforts bordering upon in loco parentis in respect to student records and reports to parents or guardians will be unnecessary, if not illegal in some cases.

Financial Support for Students

If most of the students are legal adults, then there would be additional ramifications in the area of financial aid. Instead of looking at the total ability of the family to pay for the education of the student, the student may, in many instances, be the only one to consider. In those cases, instead of using an instrument such as the Parents' Confidential Statement as a prime basis for determining financial aid, another form such as the Student's Financial Statement can be used.

In attempting to determine the financial independence of a student, the institution may use the tax dependency of the student in relation to

the parent as one criterion for such determination. If the parents claim the student as a dependent insofar as their income tax is concerned, then the college might insist that the student is indeed not financially independent. This is certainly a fertile field for further judicial determinations.

The lowering of the age of majority can probably be expected to lend more impetus toward many students' exerting their financial independence as well as some parents' encouraging this move. The number of these students and parents may be small, but it seems that the impetus and momentum is toward an increase in the number of those persons.

Tort Liability

The area of tort liability may have several ramifications affecting higher education if the age of majority is lowered. Adult students are responsible for their own actions and can sue and be sued. Without involving the parents in the case, the college is free to press charges against a student who damages property or in any way commits a tort against the institution. Students will thus be forced to accept more responsibility for their actions on campus including the use of college facilities and for publications which may be libelous.

On the other hand, if students are adults, it may well be that they would be more inclined to press charges against the institution and/or other students when they believe their rights have been violated. One example of such action is where the institution is disrupted and possibly closed as a result of action by militants. Also, an adult student may be more prone to press charges against a professor who has allegedly graded him arbitrarily or unfairly or who may have misused the classroom. This is not to say that all students are apt to file a court suit when they reach the age of majority, but since they will then be clothed with the responsibilities which attach to that status, they will in all likelihood be more zealous of their rights.

Campus Activities

There are numerous campus activities which may be affected indirectly as a result of the lowering of the age of majority. Adult students may be less likely to accept without question many of the rules, regulations, and restrictions surrounding any activity on campus. Since students will in all probability be more concerned with their finances, they probably will be more apt to question such things as a uniform activity fee or an athletic fee. They will probably ask for a kind of "cash and carry" approach to such things as athletic contests, student publications, and other campus activities which have traditionally received funds derived from a uniform student activity fee.

Since more students are being named to various governing boards, committees, and other panels, then campus rules such as those regarding alcoholic beverages may come in for additional scrutiny. In the area of academics, adult students will be more likely to question any course or requirement which they may not perceive as a valid prerequisite to the program necessary to achieve their objective.

Almost any campus activity seems to be affected indirectly by the lowering of the age of majority. A new awareness of adulthood on the part of students will tend to force the concept of accountability for the required expenditure of any funds or efforts on the part of students.

Conclusion

Whatever ramifications the age of majority may hold for higher education, it is hoped that both students and the institution will perceive those circumstances as opportunities for progress. Once the new roles of each party are recognized and accepted, the energies of all may then be directed toward the true aims and purposes of the institution as well as the individual in order that he may progress to the fullest extent of his capacity and potential. Hopefully, old restraints and hindrances to those goals may be cast aside in order that real progress can be achieved in building a better society.

FOOTNOTES

1. **Dixon v. Alabama State Board of Education,** 294 F.2d 150 (1961).

2. **Ibid.**

3. **Tinker v. DesMoines Independent Community School District,** 393 U. S. 503 (1969). Numerous other decisions have been rendered in which this declaration has been made.

4. This concept was first enumerated by the court in **Gott v. Berea College,** 161 S.W. 204 (1913) when it stated "College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy."

5. Almost all of the cases decided relative to students and their constitutional rights have a bearing upon the concept of in loco parentis. Representative cases which strike at the validity of that doctrine include the following: **Dixon v. Alabama State Board of Education,** 294 F.2d 150 (1961); **Goldberg v. Regents of University of California,** 57 Cal. Rptr. 463 (1967); **Moore v. Student Affairs Committee of Troy State University,** 284 F. Supp. 725 (1968); **Tinker v. Des Moines Independent Community School District,** 393 U. S. 503 (1969); **Esteban v. Central Missouri State College,** 415 F. (2d) 1077 (1969); **Norton v. Discipline Committee of East Tennessee State University,** 419 F. (2d) 195 (1969); **Scoggin v. Lincoln University,** 291 F. Supp. 161 (1968); **Hammond v. South Carolina State College,** 272 F. Supp. 947 (1967); **Dickey v. Alabama State Board of Education,** 273 F. Supp. 613 (1967); **Bayless v. Martine,** 430 F. (2d) 873 (1970); **Sword v. Fox,** 446 F. (2d) 1091 (1971); **Healy v. James,** 92 S. Ct. 2338 (1972).

6. Lewis B. Mayhew, "Higher Education––Toward 1984," **Educational Record,** Summer, 1973, pp. 215–221.

7. Although there may be exceptions, it is the general rule that minors retain the same domicile as their parents, unless they are legally adopted by an adult in which case their domicile would then be that of the adopted parent.

8. 41 L.W. 4796 (1973).

9. **Ibid.**

10. **Mollere v. Southeastern Louisiana College,** 304 F. Supp. 826 (1969).

11. **Pratz v. Louisiana Polytechnic Institute,** 316 F. Supp. 872 (1970).

12. **Pratz v. Louisiana Polytechnic Institute,** 28 L. Ed. 541 (1971).

13. **Cooper v. Nix,** 343 F. Supp. 1101 (1972).

ACADEMIC FREEDOM AND DUE PROCESS IN THE CLASSROOM

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The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues' and not through any kind of authoritative selection.

> Mr. Justice Potter Stewart, in **Shelton v. Tucker,** 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960).

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a specific concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

> Mr. Justice William J. Brennan, in **Keyishian v. Regents,** 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967).

Some three quarters of a century ago, at a time when the German universities were something of a Mecca for American graduate students, the phrase **Lehrfreiheit und Lernfreiheit** was known all over the world. The teaching freedom and the learning-freedom somehow implied that academic freedom was double-edged; it belonged both to faculty and to students. I do not suggest that the German universities ever fully attained the ideal, then or even now, but the German language probably has the best three-word slogan to describe it.

Accordingly I divide this discourse into two major parts: one dealing with the classroom liberty for professors and teachers, the other concerned with the corollary elbow-room for students at the level of the college or university.

With regard to the first part, there are a number of recent judgments of high federal courts that enable us to examine what the law is and what it is coming to be. The trends are encouraging. But when we shift to academic freedom for students, we do not find many decisions directed at the classroom. A year ago I completed a book dealing with some 300 federal and state decisions on the rights and obligations of students, but hardly one relates directly to what goes on in the classroom or in the actual processes of instruction. Thus far the judges have abstained from allowing themselves to be drawn into any appraisal of practices and customs of college instruction directly.

It is true that the federal courts have greatly expanded the concept of the civil rights of students, especially those of free speech, assembly, association, and petition, freedom from unreasonable searches and seizures, and the right to due process in disciplinary proceedings. But virtually all the cases have arisen from extra-classroom activities such as editing a student newspaper, inviting outsiders to speak on the campus, organizing parades or picketing or sit-in demonstrations, or litigation of controversies related to admissions and fees and student

financial aids, or to living in dormitories, or to other matters not immediately connected with classroom instruction.

I shall adhere to the classroom even though there is practically no relevant body of judge-made law to examine. This will give me an opportunity to speak **ex cathedra** about what I personally believe to be the appropriate scope of academic freedom for students in the instructional mill. I welcome that opportunity because all is not as well as it might be in that crucial area. During the recent decade of litigation involving students, the adversary parties have usually been the college president or other college administrators. My guess is that during the next decade and in future years the source from which students will gain more freedom will be the faculty, or at least such professors and teachers as insist on snobbish, discourteous, unreasonably discriminatory or sarcastic attitudes toward any students, and who rigidly cling to the out-moded claptrap features which tend to make the process of learning a boring treadmill rather than an enjoyable series of voluntary adventures.

Meantime, before we come to that, let us look at some of the recent decisions involving the professor or teacher in the classroom.

Academic Freedom in the Classroom: for the Faculty Member

There are a few recent decisions of federal courts touching directly what a teacher may properly say or do in the classroom. If we begin with the year 1965 (eight years ago), we find the case of **Parker v. Board of Education of Prince Georges County, Maryland,** which reached the Fourth Circuit U. S. Court of Appeals.

Ray Elbert Parker was a first-year probationary teacher in a public high school. He asked his pupils to read the famous book **Brave New World** by Aldous Huxley, copies of which were in the school library. He also discussed the book in class. Upon hearing of this, an irate parent asserted that the book was "atheistic, obscene, and immoral," and demanded that both Parker and the book be removed from the school.

On a list of approved books which had been officially issued, **Brave New World** was listed as "optional." (Some of the books were listed as "required" and some as "c tional.") The board of education ordered the book removed from the library, resolved not to renew Parker's contract, and refused to give him a hearing. He went to the U. S. District Court, where Chief Judge Roszel C. Thomsen flatly held that no constitutional rights were involved and dismissed the suit. This affords probably a fair sample of the position of the federal courts on a matter of this kind as recently as eight years ago. The teacher's employment was simply a matter of contract governed by state statutes; and disputes, if any, would be for the state courts, and a federal court had no jurisdiction.

This position was made all the stronger by the fact that Parker's contract expressly provided that **either party could terminate it by giving the other party thirty days' notice.** This feature was held to be lawful under Maryland statutes. When Parker appealed to the Fourth Circuit the case was reviewed by a three-judge panel composed of Circuit Judges Albert V. Bryan and J. Spencer Bell with Senior District Judge Alfred E. Barksdale sitting by designation. They quickly affirmed Judge Thomsen's judgment and explicitly declined to pass upon any alleged constitutional issues such as freedom of speech or the right to due process. Said they: "Our decision rests entirely on the contract."[1]

Sharp contrasts with the Prince Georges County case are provided by two decisions of the First Circuit U. S. Court of Appeals in 1969 and 1971. Both cases arose in Massachusetts.

When Robert J. Keefe, teacher of a high school senior English class at Ipswich, began the school year in September 1969, he found that his department head had supplied him with multiple copies of the **Atlantic Monthly.** He gave out 27 copies to his class and assigned the leading article for reading and discussion. The article, a

scholarly sociological essay, contained a vulgar word, a word until recently generally regarded as unprintable but now commonly seen in many publications. In class, Keefe discussed this word briefly along with the whole of the article. Parents of some members of his class promptly stirred up a storm.

Keefe was on tenure. Yielding to the importunities of the parents, the School Committee notified him that it would hold a forthcoming meeting to consider suspending him for thirty days for "conduct unbecoming a teacher and other good causes," that another meeting would be held one month later to consider permanently dismissing him for the same causes, and that he was entitled "to a written charge or charges, and to a hearing before the School Committee at which you may be represented by counsel, present evidence, call witnesses to testify in your behalf, and to examine them and to cross-examine other witnesses."

He then asked U. S. District Judge Andrew A. Caffrey for a temporary injunction to prevent the second meeting of the School Committee. Judge Caffrey held that the injunction could not be justified, for two reasons often invoked under federal court rules: (1) the plaintiff was unlikely to ultimately prevail on the merits, and (2) he would not be irreparably harmed if he lost, because he could bring suit for damages.

On appeal to the First Circuit, this judgment was reversed and remanded by the three-judge panel: Chief Judge Bailey Aldrich and Circuit Judges Edward M. McEntee and Frank M. Coffin. Judge Aldrich wrote the opinion:

> We accept the conclusion of the court below that 'some measure of regulation of classroom speech is inherent in every provision of public education' . . . But we find it difficult not to think that its application to the present case demeans any proper concept of education. The general chilling effect of permitting such rigorous censorship is even more serious.

Here he quoted from the U. S. Supreme Court in the Oklahoma loyalty oath case of 1952:[2]

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who are immediately before this court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . .

Judge Aldrich thought it probable that Keefe would prevail on the issue of lack of any notice that a discussion of this article with the senior class was forbidden conduct. And he was "not persuaded by the district court's conclusion that no irreparable injury is involved because the plaintiff, if successful, may recover money damages. Academic freedom is not preserved by compulsory retirement, even if at full pay." He also pointed out that no fewer than five books by different authors, containing the alleged vulgar and obscene word in question, were in the school library. He concluded, "It is hard to think that any student could walk into the library and receive a book, but that his teacher could not subject the content to serious discussion in class."[3]

Two years later a case closely paralleling the Ipswich case arose at Lawrence, Massachusetts, and again produced a decision sustaining reasonable academic freedom for the teacher in the classroom. Roger A. Mailloux, a tenured teacher with a class of eleventh graders, took occasion in his classroom to discuss the use of "taboo words" in various times and places, as part of the current study of a novel in which that phenomenon was mentioned. He switched for a moment from historical instances to the present day, and wrote on the chalkboard a word that was until recently regarded as obscene and unprintable, as an example of a "taboo word" of today. Some of the parents of some of his students were outraged by accounts they received of this incident.

The school committee of the city of Lawrence suspended Mailloux for a few days and then discharged him for "conduct unbecoming a teacher." He asked for injunctive relief from U. S. District Judge Charles Edward Wyzanski. Judge Wyzanski issued a judgment against the city of Lawrence and the individual members of the school committee, including a triple

order: (1) continue the teacher in employment until the end of the academic year, (2) expunge from the records all reference to his suspension and discharge, and (3) compensate him for salary loss (approximately $2,000).

The key paragraph of Judge Wyzanski's reasoning is here quoted:

> I support a qualified right of a teacher, even at the secondary level, to use a teaching method which is relevant and in the opinion of experts of significant standing has a serious educational purpose. This is the central rationale of academic freedom. The Constitution recognizes that freedom in order to foster open minds, creative imaginations, and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth. We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options for which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth.

The judgment for the teacher, Roger A. Mailloux, was affirmed by the First Circuit U. S. Court of Appeals, with Circuit Judges Aldrich, McEntee, and Coffin joining in a unanimous opinion. They quoted the gist of District Judge Wyzanski's opinion with approval, and said:

> We find the ground relied on below as dispositive to be both sound and sufficient . . . The district court found that the plaintiff's conduct was within standards responsibly, though not universally recognized, and that he acted in good faith and without notice that these defendants as his superiors, were not of that view. To penalize him in these circumstances would be a denial of due process.[4]

Do not be turned off by the fact that the two decisions just discussed involved high school teachers. The principles of civil rights for teachers are not limited to college professors; and you may be assured that if a particular exercise of academic freedom is upheld in a high school, it will be all the more likely to be sustained in a college or university.

We do have a decision in 1971 of a U. S. District Court in Kentucky involving free speech by a university instructor in the classroom. At Eastern Kentucky University, Mrs. Phyllis B. Hetrick was dropped at the end of her first probationary year, she alleged, because she had discussed the Vietnam war and the military draft in one of her classes during the Vietnam Moratorium in mid-October 1969. She was notified in February 1970 that she would not be re-appointed for the academic year 1970–71 but never formally given reasons or a hearing. She was told she was "unsociable" and that her class assignments were "inconclusive." When she sued in the U. S. District Court, Judge Mac Swinford declined to dismiss her case summarily and ordered a trial of the facts.

"The principal questions raised by the pleadings," said he, "are whether Mrs. Hetrick's activities came within the area of speech protected by the First Amendment and whether her dismissal was predicated on her engagement in these activities." He concluded:

> It may be fairly stated that an employee of a state does not have a constitutional right to have his contract renewed . . . but does have a constitutional right not to be dismissed solely because he has exercised his constitutional rights in a manner displeasing to certain of his superiors.[5]

At the trial of the facts it was decided that the issue related to teaching performance rather than to any constitutional right of the teacher.

Academic Freedom in the Classroom: for the College or University Student

To discuss academic freedom for students without confusion, it is necessary to draw carefully several distinctions:

1. **The age and maturity of the student.** For our purposes here we consider only persons above the age of eighteen who are in college or graduate school or professional school. For our purpose there is no upper limit of age. Probably at present the median age is in the early or middle twenties. It will rise somewhat as the numbers of graduate students grow and as larger numbers of adults of all ages return to studies at all levels above high school. Our main point is that we are not speaking of children below eighteen, not thinking of the teachers as being in loco parentis; we are concerned with adults, mostly young adults, all of whom are old enough to vote.

2. **The type of studies.** "Tool subjects" such as minimal literacy in a foreign language or the techniques of statistics in elementary forms leave little room for argument. They require simply that the student apply himself diligently, memorize the essentials, and practice their application. This is probably also true of most mathematics and natural sciences, except in their higher and experimental ranges. It is also true of much technical and professional study, even at the most advanced levels. In medicine, for example, students are loaded with laboratory and clinical work and cram for examinations. Interns and residents are notoriously overworked and are expected to accept and obey: "Theirs not to reason why, theirs but to do and die." For some time now the current generation of scientists and engineers and physicians have literally been kept so busy with narrowly technical and professional concerns, both in college and afterward in practice, that many of them are babes-in-the-woods in their grasp of the important economic, social, and political issues of today.

   Let me hasten to say that this is not true of **all** scientists or technical or professional persons or of all colleges of medicine or engineering or other science-based professions. I am only pointing out that to some degree at least the mathematical, scientific, and technical studies, though perhaps stimulative of inventiveness and originality, do not seem to emphasize or prize free speech by students in the classroom. To whatever extent this is true and ought to be true, they are outside the purview of this paper.

3. **The humanities and social sciences.** It is in the study of history, philosophy, economics, sociology, and government, and their various subdivisions and interdisciplinary combinations, that free expression on controversial topics seems most indispensable, if education is to lead to optimum progress in civilization. After gaining a beginning basis of factual knowledge, each student must be allowed to form his own opinions and express them. It is thus that his interest will be stimulated, his curiosity whetted, so that further studies will become a fascinating adventure rather than a routine chore. Let each student have the feeling of a free citizen who is not temporarily under restraint (except the restraints of courtesy and relevance).

All Education is Self-Education

Students sacrifice their time to attend college and make use of the opportunity in numerous ways according to their individual life-styles, but one certainty is that no one is "given" an education without effort on his own part. This effort, however, may well involve a good deal of leisurely contemplation ("giving college a chance to work its way through the boy"), and it can be largely a pleasurable pursuit of curiosity, though at times strenuous and all-absorbing. It need not and should not be either dull or painful. Sadly, there is some evidence that some professors are afflicted with what Sir Eric Ashby has called "Calvinism of the intellect"--believing that nothing can be good unless it is painful.

Here we are discussing matters with which the courts rarely concern themselves directly, but there have already been occasional decisions in which these considerations appear, at least obliquely. For example, a teacher in his third probationary year at Coalinga Junior College in California was dropped at the expiration of his contract after due notice, a written statement of reasons, and a hearing before the board of trustees. A California court of appeal sustained the determination, and made a part of the court record some excerpts from the findings of fact by the board of trustees:[6]

(1) The teacher's philosophy with respect to grading is unsuitable for the junior college level and is contrary to accepted practices . . . in that he has an extremely 'tough' attitude toward his students which causes excessive dropouts during the semester and between semesters; his severity of grading, his tough philosophy, his sarcasm toward his students, particularly those who may disagree with his philosophy, results in many students either failing to take his courses or failing to complete them, resulting in said students missing an important basic course.

(2) He proved ineffective as a counselor, with extremely poor rapport with his students . . .

(3) He has a general reputation among students, faculty, and the community as a contentious person, which lessens their respect for him, thereby reducing his effectiveness as a teacher.

Much Petty Friction and Busywork Can Be Eliminated

There also persists to some extent, even in advanced graduate and professional colleges, something of the idea that learning is a hazing process, in which the learner must be made as uncomfortable as possible, humiliated and subjected to psychic stress from artificial causes. This can be cultivated by the personal relations between professor and student and by adherence to the routines of requiring voluminous term papers, midterm papers, and too frequent tests and examinations. These practices, carried to excess as they often are, bring along with them so much unnecessary and damaging stress that they become counter-productive as far as learning is concerned, and lead to such childish aberrations as so-called "cheating" on examinations and the buying and selling of required papers.

This gives much concern to professors who are either unaware of or unwilling to adopt alternative ways of conducting classes that would make these peccadilloes impossible. Probably papers should not be required unless the professor can find time to read them carefully and discuss each one with the student concerned. The scheme of requiring scores of lengthy papers, so numerous and voluminous as to be read only by student assistants or perhaps not read at all, is bound to bring abuses because it is a denial of a candid and informed personal relationship between professor and student. There are various ways of making "cheating" on examinations impossible, among which are publishing the questions weeks in advance of the date or permitting students to use textbooks and reference books and papers in the examination room. Other variations and refinements of these are possible.

The conclusion is that somehow we must rise above the adolescent idea that the teacher is the natural enemy of all students and that the utmost student ingenuity must be devoted to ways of "beating the system," such as burglary to obtain examination questions or the exercise of plagiarism in a hundred varieties, from stealing the work of a fellow-student to buying term papers from a commercial research firm. I venture to doubt that these things can be prevented by state laws or by harsh disciplinary rules providing for severe penalties. They can simply be relegated to history if we supplant medieval methods of teaching and testing with new ways based on a courteous and urbane relationship between professor and student, each taking part as a learner in a mutually helpful partnership.

A Rubber Yardstick May Be Worse Than None

No doubt you will instantly recognize that this may call for, in many instances, smaller classes, smaller student-faculty ratios, to allow professors a fair opportunity to do their jobs. Consider what this means in terms of financing, and ponder especially what its impact is upon the tons of esoteric papers reporting alleged "controlled experiments" purporting to show no gain from small classes. This is because the standard tests measure only a small fraction of the results of human development. They are like the inspection of the elephant by the six blind men of Hindustan--the one who grasped the tail concluded that the animal was very like a rope, and the one who stumbled against the leg was equally sure that the animal was very like a tree.

To measure persons against each other according to the numbers of details they remember from a narrowly structured course of a few weeks is to ignore that the actual outcomes of education persist for fifty years, indeed forever, and that they are not numerically measurable. Anyone who understands this will hesitate to believe a small class is not better than a large one, other factors being equal. If we measure only the short-term results that can be reduced to arabic numerals and decimal points we fall unawares into the grand illusion that the unquantifiable outcomes can be ignored, and forget that a half-truth may be the most deceptive kind of untruth.

Opportunity for debate, sometimes impromptu and sometimes formally prepared, is of the essence of learning in the social studies and humanities; and any hint of letting a student's mark be influenced by his personal views of a controversial question must be avoided. In the interest of openness students should feel free to express their own preferences with complete sincerity. In many college classrooms this is not now the case. In some, it is the case.

This is a matter with which the courts have as yet had little to do. One could cite a dozen decisions in which medical students or law students have been declared failures and denied the degree, but these would not be in point here, because on the surface, at least, they do not involve academic freedom.

My proposal is simply that in the appropriate colleges, and in the appropriate departments of universities, the faculties in general take steps to place more emphasis than ever before on safeguarding and encouraging the academic freedom of the student. Encourage open, candid, fearless discussion of controversial questions. Set up simple and fair procedures whereby students who feel aggrieved by the granting or withholding of marks or academic credits can readily obtain an unbiased review of those actions, similar to the processes now required in disciplinary cases. Up to now, the power of the professor or instructor in these academic matters is regarded as virtually absolute--a situation that is really not healthy, and not in accord with currently rising standards of fairness. An occasional orderly and searching review of some of his decisions and practices might be exceedingly good for a professor or instructor who is altogether too rigid or hasty or contemptuous of the dignity of the individual in his judgments. It might also tend to improve greatly the openness, candor, and integrity of the instructional processes throughout the institution--a gain of incalculable value.

FOOTNOTES

1. **Parker v. Board of Education of Prince Georges County,** (U.S.C.A., Md.), 348 F.2d 464 (1965); affirming 237 F. Supp. 222 (1965).

2. **Wieman v. Updegraff,** 344 U. S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952).

3. **Keefe v. Geanakos,** (U.S.C.A., Mass.), 418 F.2d 359 (1969); reversing 305 F. Supp. 1091 (1969).

4. **Mailloux v. Kiley,** (U.S.C.A., Mass.), 448 F.2d 1243 (1971), affirming (U.S.D.C., Mass.), 323 F. Supp. 1387 (1971).

5. **Hetrick v. Martin,** (U.S.D.C., Ky.), 322 F. Supp. 545 (1971); judgment adverse to the teacher was entered February 29, 1972. On appeal to the Sixth Circuit Court of Appeals, oral arguments were heard April 12, 1973. The decision of the Sixth Circuit, in June 1973, affirmed the adverse judgment.

6. **Raney v. Board of Trustees of Coalinga Junior College District,** (Cal. App.), 48 Cal. Rptr. 555 (1966).

WOMEN'S RIGHTS IN EDUCATION

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The Statutory Basis

Women's rights in education today are based, in large measure, on statutory provisions of federal, state, and even local government. In addition, educational institutions which receive federal contract money are subject to an executive order of the president[1] and implementing orders and guidelines requiring equal employment opportunity regardless of sex. For purposes of our discussion today, I must assume that you have some familiarity with this legislation; my initial comments therefore will concern the differing legal foundations of women's rights vis-a-vis private and public educational institutions.

The Equal Pay Act of 1963[2] and Title VII of the Civil Rights Act of 1964[3] now apply both to public and to private employers. Women are protected from sex discrimination with respect to the terms and conditions of their employment, as well as with respect to receiving equal pay for equal work performed. However, the obligations of public and private employers are not identical. Public employers have both an advantage and disadvantage when compared with private educational employers.

The advantage is a recent one. While the Equal Pay Act now covers all employees, of public as well as private institutions, only the federal government itself may sue a public institution, whether for damages or injunctive relief, under the Equal Pay Act. This restriction results from a ruling of the United States Supreme Court in **Employees of Department of Public Health and Welfare v. Missouri** earlier this year.[4] While relieved of liability with respect to a lawsuit filed by a private attorney on behalf of an individual or group of employees, the public employer's disadvantage is that it is subject not only to lawsuits brought under the Equal Pay Act and the Civil Rights Act but also to litigation brought directly under the Fourteenth Amendment to the U. S. Constitution. Constitutional litigation under the Fourteenth Amendment first requires a finding of "state action" on the part of the employer. The question of the required relationship of an educational employer to state government is currently under consideration in a sex discrimination lawsuit filed by Ina Braden against the University of Pittsburgh, a "state-related" institution.[5] State and local laws also often differentiate with respect to jurisdiction over public and private employers, with coverage of the latter often being more extensive than of the former.

In considering women's rights in education today, it is useful to consider the various aspects of the employment relationship separately.

Recruiting and Advertising for Employees

Recruiting

Fair employment practice law today requires that refraining from discriminating against women is often not enough. An affirmative obligation to recruit women will be required in many instances when the employer is a federal contractor required to file an affirmative action program or where an

employer has discriminated against women in the past with the result that women are not adequately represented in the work force.

The obligation of fair recruitment may oblige an educational institution to recruit employees from sources not previously used. For example, a college accustomed to recruiting its teachers from a co-educational university in its own community and men's colleges throughout the state may be obliged to recruit from women's colleges as well.[6]

Advertising for Employees

While employers have an obligation not to indicate a sex preference in the body of an employment advertisement absent a "bona fide occupational qualification" for the job,[7] it is clear today that this obligation also requires an employer to ensure that its advertisements are not placed in classified columns under headings specifying a sex restriction. Indeed, under language of some state statutes and local ordinances, a prospective employee may sue the newspaper that places an ad under "Help Wanted--Male," as well as the employer placing the ad. In **Pittsburgh Press** v. **The Human Relations Commission**, decided by the United States Supreme Court this year, a Pittsburgh city ordinance was interpreted to prohibit the publication of such "sexsegregated" column headings, and was then upheld as constitutional against the claim that, thus interpreted, a denial of freedom of the press resulted.[8] Since testimony in the Pittsburgh case established that if no instructions are forwarded by an employer, the newspaper itself will select the column heading under which it assumes an advertisement should be placed,[9] an educational institution, to protect itself, must not only carefully draft the language of the advertisement itself but also should specifically request that its advertisements be placed under a sexually neuter column heading.

Refusals to Hire

Refusals to Hire Married or Pregnant Women

Employers, particularly educational institutions, in past years often refused to hire married women. Without going into the purported reasons for preferring to hire single women, it should hardly be surprising that those who once refused to hire married women now turn pregnant women away. While the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission (EEOC) make clear its view that such practices are illegal,[10] no court has yet ruled on the question of an employer's refusal to hire a pregnant woman. Failure to hire married women, however, when an employer does hire married men, violates Title VII of the Civil Rights Act. Such a practice was considered and declared illegal by a federal appellate court in **Sprogis** v. **United Airlines.**[11] In **Sprogis**, the airline had refused to hire married women for positions as stewardesses.

Anti-Nepotism Rules

Many educational institutions also refuse to hire women whose husbands they employ. While nepotism or the practice of hiring one's relatives is a practice that in the past has led to perpetration of race discrimination, a **prohibition** of hiring more than one member of a family all too often has the effect of denying jobs to qualified women, thereby promoting sex discrimination. For this reason, the Department of Health, Education and Welfare (HEW), in guidelines issued last year applicable to educational institutions holding federal contracts, has declared that where anti-nepotism rules have a disparate effect upon women, it will view such rules as illegal.[12]

While few court cases have considered the validity of anti-nepotism rules of educational employers, one federal appellate court has ruled that such

policies raise a substantial federal question requiring the convening of a three-judge federal court.[13]

Testing

Fair employment practice decisions define "testing" to include any type of test or condition which a prospective employee must meet as a condition of employment. Since 1971 it has been clear as a result of a decision of the United States Supreme Court in **Griggs** v. **Duke Power** that if an employment test has a disparate effect upon one's race, its use cannot be continued absent a showing that the test involved has been "validated."[14] The concept of validation requires that the test be demonstrated to be one that tests characteristics of job applicants related to the work that they must actually perform. In addition, before an employer may use even a validated test which has the effect of discriminating against one sex, the employer must prove the need to use such a test as a matter of business necessity. In other words, if an alternative method of employee selection could be used that would have the desired effect of screening out those candidates not suited for the job without having a disparate effect on members of one sex, use of the testing method having such a disparate effect would be illegal.

While most tests challenged to date as discriminatory have been general intelligence tests alleged to have a racial impact, it is likely that certain types of practices common to educational institutions increasingly will come under attack as sexually discriminatory. Use of subjective criteria, whether for initial hiring or for promotion, can be expected to be ruled illegal where the resulting employment decisions have a disparate effect on the hiring or promotion of women.

In particular, use of a faculty or appointments or tenure committee permitting each individual committee member to vote a subjective, and therefore possibly prejudicial, view when considering promotion of a member of the faculty may be prohibited by the Civil Rights Act of 1964. Case law already provides that subjective decisions of a superior based on unwritten and unknown standards constitute a violation of the act when the resulting decisions have a disparate effect on members of a minority race.[15] In the same way, it can be expected that if faculties fail to appoint and promote women in proportion to the numbers of men who appear qualified for academic positions, federal courts eventually will require use of objective criteria in faculty hiring and promotional decisions.

Cases have already been filed and some out-of-court settlements secured in situations where women feel that their failure to achieve tenure was motivated by discriminatory considerations. In addition, a federal court order in mid-1973 awarded preliminary relief to Dr. Sharon Johnson against the University of Pittsburgh for its failure to promote her to a full professorship and grant her tenure on its medical school faculty.[16] Dr. Johnson's case was filed under Title VII of the Civil Rights Act of 1964. While its standards arguably may be higher than those established in litigation under the Fourteenth Amendment to the United States Constitution, a number of federal appellate courts have now applied Title VII standards relating to employment testing to Fourteenth Amendment cases.[17] In view of these decisions, there would appear today to be no difference in the applicable standard in testing cases, regardless of whether court action is filed under Title VII or under the Fourteenth Amendment alone.

Leave Policies and Fringe Benefits Programs

Educational institutions, typically, have been more generous in making leave time available to employees than have other employers. It is ironic indeed that litigation alleging sex discrimination in leave policies has more often been directed against educational employers than others. Sabbatic leaves, although often alleged to be less readily available to women than to men, to date have not been the subject of extensive litigation. It is maternity leave policies that have generated lawsuits in largest numbers.

Maternity Policies

Equal Availability of Leave

Early cases in lower federal courts concerned whether the granting of maternity leave could be restricted to teachers who had tenure[18] or whether an employer could adopt different policies for its married and unwed employes.[19] In both situations, courts ruled in favor of the general availability of such leaves to female employees, regardless of whether they were tenured or wed.

Maternity leave typically is available for a period of time after childbirth as well as before. Often employers may permit an employee to remain away from work until the child reaches the age of one or two. It therefore was not surprising that a male teacher eventually went to court seeking the right to a leave of absence for child rearing purposes after his wife gave birth. The federal district court involved ruled in favor of a father's right to a leave of absence under the university's maternity leave policy where he was employed.[20]

Mandatory Aspects

Although occasional lawsuits have tested the equal availability of maternity leave, the vast majority of cases have challenged maternity regulations requiring a teacher to take a leave of absence at a certain stage of pregnancy regardless of her ability to perform a job and regardless of whether her doctor is willing to permit her to continue working.

An early case reaching a federal appellate court concerned a woman employed by the military. In this case, the court upheld the right of the government to discharge a pregnant officer.[21] Later cases have litigated the rights of clerical employees and teachers to work while pregnant. In these cases, different federal appellate courts have ruled different ways. At this time the Courts of Appeals for the Fifth[22] and Fourth[23] Circuits have upheld employers' mandatory maternity leave rules, while the Courts of Appeals for the Second,[24] Sixth,[25] and Tenth Circuits[26] have been persuaded that pegnancy should not be treated differently from other temporary medical disabilities. In view of this conflict among the federal appellate courts, the United States Supreme Court has now agreed to hear the **La Fleur** and the **Cohen** cases, two of the cases in which appellate courts reached differing results.

It is useful to note that while the United States Supreme Court this fall will consider a teacher's right to continue working during pregnancy while she is medically fit, the cases which the Supreme Court will hear are cases arising under the Fourteenth Amendment only. Interpretation of the Civil Rights Act of 1964 by the Equal Employment Opportunity Commission requires employers to treat pregnancy for all fringe benefits and leave purposes like other temporary medical disabilities.[28] The lower federal courts only now are beginning to be confronted with the need to resolve these same maternity leave questions under the strict standards of Title VII. Although all employers with more than fifteen employees are now covered by the Civil Rights Act, many lawsuits are likely to continue to be brought under the Fourteenth Amendment alone. The continued vitality of the constitutional provision in maternity cases is due in part to the procedural technicalities of Title VII litigation. In particular, the 180-day waiting period after a charge has been filed with the EEOC before a complaint may be filed in a federal district court is apt to be a major obstacle to proceeding under Title VII, if a quick determination of a person's rights is required. To date, no decisions have yet been handed down by any federal courts with respect to the required treatment of pregnant employees under the Civil Rights Act of 1964.

Related Benfits

While maternity leave itself is now a major issue for employers of women, the required treatment of pregnancy for leave purposes appears simply to be the cornerstone of a host of issues concerning legal rights of employees before and after childbirth. Teachers have now successfully sued to gain the right to use their accumulated sick leave for maternity purposes and to demand reinstatement of seniority lost as a result of

absences due to maternity.[29] Cases have also been filed, although not yet decided, challenging the lesser disability insurance benefits provided under group plans by employers for childbirth as compared with employer benefits provided for other medical conditions.[30]

Termination or Retirement

Termination

Although marriage is generally no longer considered adequate reason to discharge a female teacher, pregnancy often is now so treated. A number of the maternity leave cases mentioned above involved plaintiffs who were denied the right to a maternity leave and were discharged instead. It is possible that the Supreme Court decisions in **Cohen** and **La Fleur** will resolve this issue as well when it considers the right of a pregnant teacher not to be required to take a leave of absence against her will.

A woman who is not permitted to work while pregnant also often will be singled out for special treatment with respect to statutory benefits for which employees out of work are usually eligible. Denials of unemployment compensation to women who involuntarily leave work due to pregnancy are more often the rule than the exception.[31] State statutes denying benfits to women able to work and seeking work, although pregnant, have recently been declared invalid in a number of states either by federal or state courts.[32] A California statute prohibiting employees from qualifying for state disability insurance provided pursuant to its unemployment compensation scheme was also recently ruled unconstitutional by a three-judge federal court.[33] Whether teachers are eligible for such benefits depends, of course, upon state law in each jurisdiction. In at least one of the decided cases, however, a teacher was the successful plaintiff.[34]

Retirement

Some employers require women to retire at an earlier age than men. Differential retirement ages based on sex have been successfully challenged in federal courts, as have pension plans which provide retirement benefits to men and women at different ages.[35]

Due to the difference in the life span of the two sexes, pension benefits payable on a monthly basis also often provide a lower dollar amount each month to women than to men. The Equal Employment Opportunity Commission and the Department of Labor originally both agreed that an employer's obligation was only to pay equal dollars **into** a retirement fund for employees with comparable salaries regardless of their sex. Now, however, EEOC guidelines require that equal benefits be paid **out** to men and women.[36] No decisions have yet been handed down by federal courts on this issue. However, a charge has recently been filed with the EEOC by the American Nurses' Association against three universities. In each case the retirement plans challenged pay lower monthly benefits to women than to men where the salaries of the two sexes were comparable during years. All three plans are sponsored by Teachers Insurance and Annuity Association of America (TIAA).[37] In addition, a lawsuit was filed late in 1972 against the Connecticut State Employees' Retirement Act which, it is claimed, discriminates on the basis of sex in favor of women.[38]

Conclusion

While relatively few court cases have been decided relating to women's rights in education, especially those rights dealing with the terms and conditions of employment, the cases which have been won are substantial first steps in the task of establishing equal opportunity for women. These cases indicate that the courts are willing to follow the precedents set in earlier years in race discrimination cases and apply the law to the area of sex discrimination. By utilizing both the federal and state laws available it is likely that the next few years will establish firmly the right of all persons to be free of invidious discrimination and base employment rights upon one's abilities rather than one's sex.

FOOTNOTES

1. Executive Order 11246, 3 C.F.R. 339, as amended by Executive Order 11375, 3 Fed. Reg. 14303.

2. Title 29 U.S.C. Sec. 206(d).

3. Title 42 U.S.C. Sec. 2000e **et seq.**

4. ____ U. S. _____, 93 S. Ct. 1614, 1618 (1973).

5. **Braden** v. **University of Pittsburgh,** 343 F. Supp. 836 **vac'd and rem'd,** ____ F.2d _____, 5 EPD Para. 8557 (3rd Cir. 1973).

6. Department of Health, Education and Welfare, "Higher Education Guidelines," 37 Fed. Reg. 24686 at 24687 (1972).

7. While this language is that of Title VII of the Civil Rights Act, many state laws and local ordinances have also adopted the "BFOQ" exception as the only instance in which sex discrimination is permissible.

8. ____ U. S. _____, 93 S. Ct. 2553 (1973).

9. Decision and Order of the Pittsburgh Commission on Human Relations, July 23, 1970, set out in Appendix to Petition for a Writ of Certiorari filed in the Supreme Court, pg. 1a of 14a.

10. EEOC "Guidelines on Discrimination Because of Sex," 29 C.F.R. Sec. 1604.10.

11. 444 F. 2d 1194 (7th Cir. 1971).

12. HEW, "Higher Education Guidelines," **op. cit.** at 24688.

13. **McSpadden** v. **Mullins,** No. 71–1496 (8th Cir. 1972).

14. 401 U. S. 424 (1971).

15. **Rowe** v. **General Motors,** 457 F.2d 348 (5th Cir. 1972).

16. **Johnson** v. **University of Pittsburgh,** ____ F. Supp. _____, 5 EPD Para. 8660 (W. D. Pa. 1973).

17. **Carter** v. **Gallagher,** 452 F.2d 315 (8th Cir. 1972), **cert. den.** 406 U. S. 950 (1972); **Chance** v. **Board of Examiners,** 458 F.2d 1167 (2d Cir. 1972); **Castro** v. **Beecher,** 459 F.2d 725 (1st Cir. 1972).

18. **Jinks** v. **May,** 332 F. Supp. 254 (N.D. Ga. 1971).

19. **Doe** v. **Osteopathic Hospital of Wichita, Inc.** 333 F. Supp. 1357 (D. C. Kan. 1971).

20. **Danielson** v. **Board of Higher Education,** 4 FEP Cases 885 (S.D.N.Y. 1972).

21. **Struck** v. **Sec'y of Defense,** 460 F.2d 1372 (9th Cir. 1971) **cert. granted,** 93 S. Ct. 292 (1972) **remanded** 93 S. Ct. 676 (1972).

22. **Schattman** v. **Texas Employment Commission,** 459 F.2d 32 (5th Cir. 1971), **cert. den.** 93 S. Ct. 901 (1973), **reh. den.** 93 S. Ct. 1414 (1973).

23. **Cohen** v. **Chesterfield County School Board,** 474 F.2d 395 (4th Cir. 1972), **cert. granted** 93 S. Ct. 1925 (1973).

24. **Green** v. **Waterford Board of Education,** 473 F.2d 629 (2d Cir. 1973).

25. **La Fleur** v. **Cleveland Board of Education,** 465 F.2d 1184 (6th Cir. 1972), **cert. granted,** 93 S. Ct. 1921 (1973).

26. **Buckley** v. **Coyle Public School System,** 476 F.2d 92 (10th Cir. 1973).

27. The author is attorney-of-record for the plaintiffs in the **La Fleur** case.

28. **Supra,** note 10. While Guidelines of the EEOC do not have the full force and effect of law, they are entitled to great deference. **Griggs** v. **Duke Power, supra,** note 14.

29. **Bravo** v. **Board of Education of City of Chicago,** 345 F. Supp. 155 (D. Ill. 1972); **Heath** v. **Westerville Board of Education,** 345 F. Supp. 501 (S. D. Ohio 1972).

30. **Gilbert** v. **General Electric,** Civil Action No. 142–72–R (filed D. Va. September 25, 1972).

31. **See, generally,** Koontz, "Childbirth and Childrearing Leave: Job Related Benefits," 17 N.Y.U.L.R. 480 (1971); Comment, "Love's Labor's Lost: New Conceptions of Maternity Leaves," 7 **Harv. Civ. Rts. Civ. Libs. L. Rev.** 260 (1972).

32. **Harwood** v. **Employment Security Commission,** 490 P.2d 1192 (Ariz. Ct. App. 1971); **Guerra** v. **Archie,** 6 CCH Unemployment Ins. Rep. Nevada Para 8168; **Omer** v. **Board of Appeals,** 5 CCH Unemployment Ins. Rep. Md. Para. 8386; **Goodman** v. **Chrysler,** C.A. No. 208538 (Mich. Cir. Ct. Wayne Co., February 6, 1973); **Jordan** v. **Meskill** C.A. No. 15671 (D.C. Conn. July 30, 1973); **In re Frankele,** Decision of Employment Security Department, State of Washington, No. 71–2921 et al. (June 16, 1972).

33. **Aiello** v. **Hansen,** No. C 72–1402 SW (N.D. Calif., May 31, 1973).

34. **Jordan** v. **Meskill, supra,** note 32.

35. **Bartmess** v. **Drewrys U.S.A., Inc.,** 444 F.2d 1186 (7th Cir. 1971), **cert. den.,** 404 U. S. 939 (1971); **Rosen** v. **Public Service Electric and Gas Company,** 409 F.2d 775 (3d Cir. 1969), decision on remand, ____ F. Supp. _____, 3 EPD Para. 8073 (D.C. N.J. 1970).

36. EEOC Guidelines, **supra** note, Sec. 1604.9 **Compare** U. S. Department of Labor, "Sex Descimination Guidelines" Title 41, Chap. 60 Sec. 60–20, 3(c).

37. Press Release, American Nurses' Association, February 27, 1973.

38. **Fitzpatrick** v. **Bitzer,** No. 15492 (filed D. Conn. December 11, 1972).

FACULTY EMPLOYMENT RIGHTS—THE SUPREME COURT SPEAKS

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The title of this paper is "Faculty Employment Rights--The Supreme Court Speaks." It will therefore deal primarily with recent decisions of the Supreme Court of the United States on faculty employment rights. I think we all recognize that any reference to the Supreme Court speaking on this subject brings immediately to mind the decisions of that court handed down exactly one year minus three days prior to today in the **Roth**[1] and **Sindermann**[2] cases. These cases have received much attention in the educational community since that time--and rightly so. They can truly be labelled as "landmark cases." In approaching this subject today, I intend to analyze the facts of these two cases in order to portray the issues presented in the lower courts as well as in the Supreme Court. My analysis of the Supreme Court decisions will then attempt to demonstrate their impact on faculty employment rights.

Roth--The Facts

Mr. Roth was an assistant professor at Wisconsin State University--Oshkosh. He was employed on a one-year contract for the 1968–69 school year on a nontenured basis. During the fall of 1968 there arose on the campus of that university, as well as on campuses of other universities across the country, controversies and disturbances involving the administrators of the university and the board of regents. Plaintiff Roth added his voice to these controversies and was vocal in his criticism of the administrators of the university and the board. In January of 1969 the president of the university notified Mr. Roth that his contract of employment would not be renewed. He gave no reason for the nonrenewal decision, nor did he offer an opportunity for a hearing whereby Mr. Roth would be afforded a forum to contest the decision on the merits. Shortly after this decision was communicated to Mr. Roth, he filed an action for declaratory and injunctive relief in the Federal District Court for the Western District of Wisconsin,[3] joining as defendants the president of the university and the Board of Regents of State Colleges. He alleged that the reason that the defendants failed to renew his contract was retaliation against him for expressions of opinion in the exercise of freedoms guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. He further alleged that the decision was not made under ascertainable and definite standards governing defendants in making the decision and that the decision had caused and would cause damage to his professional reputation and standing. He sought judgment that his rights and the rights of others similarly situated under the First, Fifth, and Fourteenth Amendments to the Constitution were violated:

1. by the decision itself;
2. by the failure to provide for hearing on the merits of the decision;
3. by the failure to give reasons for the decision; and
4. by the failure to make the decision in accordance with ascertainable and definite standards previously formulated.

In addition, plaintiff sought an order of the court directing his employment for the 1969–70 school year.

The district judge held that procedural safeguards had not been afforded Mr. Roth. The judge reasoned that the decision not to retain him could not rest on a basis unsupported by fact or without reason and that, such being the case, procedural safeguards were required against nonretention in violation of First Amendment rights and against arbitrary nonretention. He stated that minimum safeguards include:

1. a statement of reasons for discharge;

2. notice of hearing;

3. a hearing at which the faculty member must have reasonable opportunity to submit evidence relevant to the stated reasons.

The court further stated that the burden of going forward with evidence and the burden of proof lay with the professor, and that it was incumbent upon him to make a reasonable showing that the reasons given for nonretention were wholly inappropriate as a basis for decision or wholly without basis in fact. The court further held as a matter of law that the faculty member was not entitled to a "code of conduct"—i.e., previously formulated ascertainable and definite standards, the violation of which would result in nonretention and compliance with which would result in retention. The decision of the court as has just been related was given in response to motions for summary judgment filed by plaintiff and the defendants. The decision as to the foregoing matters was based upon legal principles applied to conceded facts. The court did not decide the issue of whether Mr. Roth's nonretention was in retaliation for his expression of opinion, which expressions were alleged by him to be protected by the First and Fourteenth Amendments.

Upon granting plaintiff's motion for partial summary judgment, the District Court ordered the defendants to furnish reasons to Mr. Roth, to give notice of hearing, and to provide a hearing for him in accordance with its decision. The court further provided that if such were not done by a date certain, the university was required to offer Mr. Roth a contract for the 1970–71 academic year. The defendants appealed from this decision to the United States Circuit Court of Appeals for the Seventh Circuit.[4] The Court of Appeals stated the issues in the lower court as follows:

1. Was the decision not to retain in retaliation for constitutionally protected expression?

2. Was the faculty member constitutionally entitled to be retained or be given reasons for nonretention and a hearing on the merits of the decision not to retain?

The appellate court correctly stated that the first issue above had not been decided in the District Court, leaving only the second issue as being before it. The Court of Appeals affirmed the decision of the lower court by a two to one decision. Dissent was entered by Judge Duffy, the senior circuit judge for the Seventh Judicial Circuit, stating essentially that the majority opinion in the appellate court and the opinion of the district court went beyond the present state of the law and would effectively destroy the tenure system.

Sindermann—The Facts

Professor Sindermann joined the faculty of Odessa Junior College in September of 1965 under a contract for the 1965–66 school year. Odessa Junior College did not have a formal tenure system. Professor Sindermann continued on the faculty under successive one-year contracts until May 29, 1969, when he was informed that his contract would not be renewed for the 1969–70 school year. Immediately after this decision was communicated to Professor Sindermann, he filed an action in the United States District Court and contemporaneously therewith requested that he be given a hearing by college authorities. No such hearing was afforded. The action in the District Court named the president of the college and the Board of Regents of Odessa Junior College in their official and individual capacities as defendants. He alleged that the refusal to renew his employment contract was based upon his exercise of First and Fourteenth Amendment rights of expression, association, and petition. He further alleged violation of due process in connection with the

refusal to renew the contract. The defendants filed a motion for summary judgment. The Ditrict Court in an unreported decision held that the relationship between plaintiff and defendant was controlled by contract and that the rights of the parties under the contract were clear. It granted summary judgment in favor of the defendants and against the plaintiff. Plaintiff took an appeal from the order of the District Court to the United States Court of Appeals for the Fifth Circuit.[5] After the appeal was taken, but before rendering a decision in **Sindermann,** the Fifth Circuit entered its decision in **Pred** v. **Board of Public Instruction**[6] classifying the rights of persons in positions such as plaintiff as being constitutional rather than contract rights, and upon finding that their decision in the **Pred** case controlled the **Sindermann** case, reversed the lower court and remanded for further development of the facts.

The Fifth Circuit, after deciding to remand the case, felt it appropriate to comment on the plaintiff's contention that the college denied him procedural due process by failing to give him a hearing. In order to determine procedural devices which ought to be available to Professor Sindermann, the court said that it was first necessary to determine whether or not the teacher had tenure or an "expectancy of reemployment" under the policy and practices of the institution. In using the term "expectancy of reemployment" the Fifth Circuit cited its own decision in **Ferguson** v. **Thomas**[7] and the decision of the Circuit Court of Appeals for the District of Columbia in **Greene** v. **Howard University.**[8] It stated that the record was too scanty to make such determination with regard to Professor Sindermann but did refer in a footnote to a paragraph in the Faculty Guide which provided as follows:

> **Teacher Tenure:** Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[9]

The court stated that if an expectancy of reemployment was found to exist on the facts, then notice and hearing would be required in accordance with standards established by its decision in **Ferguson.**

I think it worthwhile here to depart somewhat from the theme of this paper to examine a portion of the **Ferguson** decision. In that case the Fifth Circuit Court of Appeals held that a faculty member without tenure but with an expectancy of reemployment could only be terminated for cause. It stated that minimum procedural due process in that circumstance requires the institution to do the following:[10]

1. Advise the faculty member of the cause or causes for his discharge in sufficient detail to enable the faculty member to show any error that may exist.

2. Advise the faculty member of the names of witnesses and the nature of their testimony.

3. Provide the faculty member with a meaningful opportunity to be heard in his own defense.

4. Conduct the hearing before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

The court in **Sindermann** further stated that if no expectancy of reemployment existed, then a procedure differing from the **Ferguson** procedure should be employed and outlined that procedure. The court reaffirmed the right of an institution to hire faculty members on a probationary basis and concluded that decisions not to reemploy probationary faculty members may be based upon any reason or no reason at all. It stated that if a professor intends to assert that the nonrenewal of his contract of employment was in punishment for exercise of constitutional rights or otherwise constitutes an actionable wrong, then the faculty member must:

1. Notify the institution with reasonable promptness of his contentions in sufficient detail so that error may be shown.

2. Request a hearing.

The institution must then constitute a tribunal to conduct a hearing that possesses some academic expertise and has apparent impartiality toward the charges. The court provided that the hearing must include the right to:

1. Produce witnesses and evidence.

2. Confront and cross examine witnesses.

3. Offer a meaningful opportunity to develop a record.

An important distinction should be noted; to wit, unlike termination for cause cases, the faculty member here bears the burden of initiating proceedings and proving that a wrong has been done by not rehiring him.

In support of the procedure thus outlined by the court, it stated:

> School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.[11]

The court further opined that a court whose jurisdiction is invoked in these matters should ordinarily stay its hand until the institutional procedures outlined by the court and as previously outlined in the **Ferguson** case are allowed to function and run their course. After the academic processes are concluded, if court action is still necessary, then the court will have advantage of the record developed within the institution. Such record would be entitled to great weight.

Summary of Roth and Sindermann in Lower Courts

To summarize the **Roth** and **Sindermann** cases, after the decisions of the Seventh and Fifth Circuits respectively, we find that in each case the issue of free speech protections has not been factually determined. The Seventh Circuit has sustained plaintiff Roth's contention that he was constitutionally entitled to a statement of reasons for discharge and a hearing thereon. This issue may be referred to as the procedural due process issue. The Seventh Circuit decided adversely to Mr. Roth in his contention that the decision by the university not to renew his contract was constitutionally invalid because it had not been made in accordance with definite and ascertainable standards.

The Fifth Circuit court in **Sindermann** reaffirmed its decision in **Ferguson** that a nontenured faculty member with an "expectancy of reemployment" could only be discharged for cause and reaffirmed the applicable notice and hearing standards in such cases. It further held that a nontenured faculty member without an expectancy of reemployment but who contended that the nonrenewal was in punishment of exercise of constitutional rights could initiate proceedings that would allow him to prove his contention and set out minimum standards for such procedures.

Roth and Sindermann—The Supreme Court Speaks

The Supreme Court of the United States in five to three decisions reversed the lower court in the **Roth** case and affirmed in the **Sindermann** case. In **Roth,** the Court reviewed the factual situation as developed in the lower courts and referred specifically to Wisconsin statutes which provided that tenured faculty could not be discharged except for cause upon written charges pursuant to procedures set out in the statute, and to the Wisconsin statute on nontenured faculty which provided for review of decisions to dismiss

nontenured faculty prior to the end of the contract year but which offered no protection for refusal to renew a contract of employment after its expiration. The Supreme Court agreed with the Court of Appeals that Mr. Roth's allegation that the decision of nonrenewal was based upon reasons violative of his right to free expression was not before it but that it only had for its consideration the issues arising out of his allegations with regard to procedural due process rights. It stated that the only question before it was whether Roth had a constitutional right to a statement of reasons and hearing on the decision not to renew made by the president of the university and the board of regents. The Supreme Court held that he did not.

The Court stated that the requirements for due process apply only to situations involving the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property and that it is necessary to look to the interest, the deprivation of which is alleged, to see if such interest is within these Fourteenth Amendment protections. In this case the interest to be examined is Mr. Roth's interest in reemployment.

In discussing the concept of liberty under the Fourteenth Amendment, the Supreme Court quoted from its decision in **Meyer** v. **Nebraska:**[12]

> While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not mere freedom from body restraint but also the right to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

The Court then said that there may be cases in which a refusal to employ a person by the state might involve interests in "liberty." It specifically pointed out that charges might be made in connection with refusal to employ that might seriously damage standings and associations in the community. More particularly, it referred to charges of dishonesty or immorality, where such charges place a person's good name, reputation, honor, or integrity at stake. In such a case, due process would require an opportunity to refute the charges before university officials. By footnote the Court indicated that the purpose of such a hearing is to provide the person an opportunity to clear his name and that once a person has cleared his name the employer remains free to deny employment for other reasons. The Court further held that declining to reemploy Mr. Roth did not impose upon him a stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities. In such cases a full prior hearing is required. In a footnote the Court stated that while a record of nonretention taken alone may make him less attractive to some other employer, it does not establish the kind of foreclosure of opportunity amounting to a deprivation of liberty. The Court stated:

> It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.[13]

The Court then discussed the concept of property under the Fourteenth Amendment. It held that the protection of property under the Fourteenth Amendment is a safeguard of the security of interests already acquired in specific benefits. It cited examples of types of property interests safeguarded by the Fourteenth Amendment as follows:

1. Continued receipt of welfare benefits;[14]
2. College professor dismissed from a position held under tenure provisions;[15]
3. College professors dismissed during a contract term;[16]
4. A teacher dismissed without tenure or formal contract but where there existed a clear implied promise of continued employment.[17]

To have a protected property interest in a benefit, a person must have:

1. More than an abstract need or desire for it.

2. More than a unilateral expectation of it.

3. A legitimate claim of entitlement to it.

The purpose of the constitutional right to a hearing is to protect such claims. The Court went on to point out that property rights are not created by the Constitution but that they are created and their dimensions defined by rules and understandings from independent sources, which rules and understandings secure benefits and support claims of entitlement to such benefits. The Court held that the plaintiff Mr. Roth presented no state statute, university policy, or contract that secured for him an interest in reemployment or that created a legitimate claim to such interest. The plaintiff had an abstract concern in being rehired but not a property interest protected by the Fourteenth Amendment.

In the **Sindermann** decision the Supreme Court quite properly pointed out that in that case as well as the **Roth** case there was a genuine dispute as to whether the college refused to renew the teaching contract on a constitutionally impermissible basis, i.e., as a reprisal for the exercise of constitutionally protected rights. It noted that Mr. Sindermann's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to a free speech claim, was highly relevant to the procedural due process issue. It pointed out that in **Roth** a mere showing that he was not rehired did not amount to a showing of a loss of liberty or property; but as the record indicated in the **Sindermann** case, Mr. Sindermann alleged that he had an interest in continued employment at Odessa Junior College which, although not secured by a formal contract or tenure, was secured by an understanding fostered by the college administration. He alleged that the college had a de facto tenure program and that he had tenure under that program, relying in part upon the paragraph from the Faculty Guide quoted in our discussion of the decision of the Fifth Circuit Court of Appeals. The Supreme Court concluded that Mr. Sindermann offered to prove that he had a property interest in continued employment not less than that of a formally tenured faculty member at other colleges. It restated from its opinion in the **Roth** case that a person's interest in a benefit is a property interest contemplated by the Fourteenth Amendment if there are rules or mutually expressed understandings that support his claim of entitlement to the benefits. These cases require due process notice and hearing. An expressed tenure provision is clearly evidence of such a formal understanding, but the absence of such expressed contractual provision does not always foreclose the probability that a teacher has a property interest in reemployment. The Court resorted to the law of contracts wherein agreements, though not formalized in writing, may be implied and express contractual provisions may be supplemented by agreements implied from words and conduct in light of surrounding circumstances, and further where the meaning of such words and conduct is found by relating them to usage of the past.

The Supreme Court disagreed with the Fifth Circuit Court of Appeals insofar as the Fifth Circuit court held that a mere subjective expectancy was protected by procedural due process. It agreed that Mr. Sindermann had alleged the existence of rules and understandings promulgated and fostered by state officials that might justify a legitimate claim of entitlement to a property interest, to wit continued employment. It pointed out, however, that proof of such a property interest would not entitle Mr. Sindermann to reinstatement but would entitle him to be informed of the grounds for nonretention and obligate college officials to provide a hearing so that he might challenge their sufficiency. Thus, while not completely agreeing with the court of appeals, the Supreme Court affirmed its judgment to remand the case to the district court.

Mr. Justice Douglas and Mr. Justice Marshall filed lengthy dissents. Justice Douglas agreed with the decision of the district court in the **Roth** case. Mr. Justice Marshall took the position that every citizen who applies for a government job is

entitled to it unless the government can establish some reason for denying that employment. This entitlement in his view was a property right protected by the Fourteenth Amendment. He stated that it was also a liberty—the liberty to work which is the very essence of the personal freedom and opportunity secured by the Fourteenth Amendment. Mr. Justice Brennan filed a separate dissenting opinion which for purposes material to this discussion can be taken as agreement with Justice Marshall.

Chief Justice Burger filed an opinion concurring with the judgments and opinions in both cases, stating:

> The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract.[18]

Mr. Justice Powell took no part in the decision on either case.

Conclusion

The majority opinion of the Court in these two decisions found that Mr. Roth had neither a liberty or property interest protectable under the Fourteenth Amendment and at the same time found that Mr. Sindermann, based upon his allegations, did have a property interest sufficient to require the college to furnish him a statement of reasons for his nonretention and to provide a hearing at which he could challenge their sufficiency. The substantive holdings of the Court in these two decisions has been summarized in **Russell** v. **Hodges**[19] by Chief Judge Friendly of the Second Circuit as follows:

> As we understand these opinions, an employee seeking to show, absent any claim of First Amendment violations, that his termination was a deprivation of 'liberty' must demonstrate that the government had made a charge 'that might seriously damage his standing and associations in his community' or had imposed 'a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities' . . . The Court made clear that by the latter phrase it meant something more than the disadvantage inevitably entailed when a person 'simply is not rehired in one job but remains as free as before to seek another' . . . 'Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty"' . . . 'Property' interests, the Court held, include not merely contractual or statutory rights to continued employment but rights acquired under a **'de facto** tenure program,' resulting from 'the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment,' . . . But the Court explained that a mere 'unilateral expectation' of continued employment was not sufficient 'property' to trigger due process guarantees.[20]

In closing, I want to mention two cases decided in the circuit courts since the Supreme Court decisions. In **Johnson** v. **Fraley**[21] the Fourth Circuit held that plaintiff Johnson, who had taught for twenty-nine years under a series of one-year contracts, did state a cause of action in that she might have been deprived of a property interest in reappointment arising out of her twenty-nine years of continuous employment and that she might have been deprived of a liberty interest in reemployment by reason of damage to her professional reputation due to the failure to renew her contract after twenty-nine years of continuous employment.

In **Skidmore** v. **Shamrock Independent School District**,[22] the Fifth Circuit held that Mrs. Skidmore, a school teacher who had been employed for twenty-two successive one-year terms, had neither a liberty or property interest protected under the Fourteenth Amendment. I cite these two cases which had virtually identical facts to demonstrate that the lower courts will arrive at differing decisions based on **Roth** and **Sindermann**. The Fifth Circuit appears to be adhering to those decisions more rigidly than the Fourth Circuit.

FOOTNOTES

1. **Board of Regents of State Colleges** v. **Roth**, 408 U. S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).
2. **Perry** v. **Sindermann**, 408 U. S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).
3. **Roth** v. **Board of Regents of State Colleges**, 310 F. Supp. 972 (W.D. Wis. 1970).
4. **Roth** v. **Board of Regents of State Colleges**, 446 F. Supp. 806 (7th Cir. 1971).
5. **Sindermann** v. **Perry**, 430 F.2d 939 (5th Cir. 1970).
6. 415 F.2d 851 (5th Cir. 1969).
7. 430 F.2d 852 (5th Cir. 1970).
8. 412 F.2d 1128 (U.S. App. D.C. 1969).
9. 430 F.2d at 941 n. 3.
10. 430 F.2d at 856.
11. 430 F.2d at 944–45.
12. 262 U. S. 390, 399.
13. 92 S.Ct. at 3708.
14. **Goldberg** v. **Kelly**, 297 U. S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.
15. **Slochower** v. **Board of Education**, 350 U. S. 551, 76 S.Ct. 637, 100 L.Ed. 692.
16. **Wieman** v. **Updegraff**, 344 U. S. 183, 73 S.Ct. 215, 97 L.Ed. 216.
17. **Connell** v. **Higginbotham**, 403 U. S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418.
18. 408 U. S. ____, 92 S.Ct. 2717, 33 L.Ed.2d _____ (1972).
19. 470 F.2d 212 (2d Cir. 1972).
20. **Id.** at 216.